

From: Mrs S Gardiner



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Head - Information Rights Team
Our reference:
FOI2020/08292

Your reference:
16/20

Mr P Burt

28th July 2021

Dear Mr Burt

FREEDOM OF INFORMATION ACT 2000 INTERNAL REVIEW

1. I am writing in response to your email of 18 October 2020, received on 19 October, which asked for an internal review of MOD's handling of your request for information under the Freedom of Information Act 2000 ('the Act'). I have now completed a full independent review of the handling of your request and substance of the responses you received. The purpose of the internal review is to consider whether the requirements of the Act have been fulfilled. The scope of the review is defined by Part 5 of the Code of Practice¹ under section 45 of the Act. I apologise for the delay in providing this internal 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 17(1) which states that, where it claims that information is exempt, 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;

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

- e. Section 17(2) which states that the notice under section 17(1) must, if applicable, state that a decision has not yet been made whether the public interest in maintaining an exemption outweighs the public interest in disclosing the information and give an estimate of the date that the authority expects such a decision will be made; and
- f. Section 17(3)(b) which states that, where the public interest in maintaining the exemption outweighs the public interest in disclosing the information, the public authority must state the reasons for claiming this.

3. Your request for information of 18 July 2020 (received on 20 July) was worded as follows, which I have renumbered for ease:

'I should be grateful if you would provide me with the following information held by the Ministry of Defence relating to the near miss incident involving a Royal Navy submarine and the car ferry Stena Superfast VII in the North Channel on 6 November 2018 (<https://www.gov.uk/maib-reports/near-miss-between-ro-ro-ferry-stena-superfast-vii-and-royal-navy-submarine>).

1. *The final report of the Ministry of Defence investigation into the incident, including recommendations and lessons learnt.*
2. *Copies of all correspondence between the Ministry of Defence and Marine Accident Investigation Branch relating to the incident.*
3. *Please also inform me what corrective or disciplinary action was taken towards the Royal Navy submarine personnel involved as a result of the incident.'*

4. Section 10(1) of the Act requires that you receive a response within 20 working days. Your request was acknowledged on 20 July and you were advised that the target date for response was 18 August. You were advised that due to the ongoing Coronavirus pandemic and the effect on resources and necessary changes to ways of working, it may take longer to provide a substantive response to some requests.

5. Under section 1, Navy Command's response of 18 August confirmed that the information related to your request was held but that some of it fell within the scope of the qualified exemption at section 26(1)(b) (defence). As such it was necessary to decide whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure to the extent that it may reveal operational practices or might otherwise compromise current or future operations or the capability, effectiveness or security of our Forces. You were advised that a further 20 working days were required, and a response would be provided by 16 September. You were informed of your right to appeal.

6. The Navy Command's response of 16 September 2020 informed you that it was taking longer than anticipated to conclude matters, but that they would contact you again by 14 October. You were again informed of your right to appeal.

7. The Information Commissioner's guidance 'Time limits for compliance under the Freedom of Information Act (Section 10)² states that '*The Act does not define what might constitute a 'reasonable' extension of time. However, our view is that an authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days.*'

² <https://ico.org.uk/media/for-organisations/documents/1165/time-for-compliance-foia-guidance.pdf>

8. The substantive response of 22 September 2020 was, therefore, not provided in accordance with the ICO's guidance, for which I apologise. In accordance with section 1, Navy Command confirmed that the information in scope of your request was held. You were advised that for part 1 of your request, information was exempt from disclosure under the qualified exemption at section 26(1)(b) (defence) and the outcome of the public interest test (PIT) was provided to you. For part 2 of your request, the absolute exemption at section 44 (prohibitions on disclosure) was applied. Under section 16, you were advised that release of the information was exempt under 'The Merchant Shipping (Accident Reporting and Investigation) Regulations 2012'. For part 3 of your request, section 40(2) (personal information) was applied. You were informed of your right to appeal.

9. In summary, your request was not handled in accordance with the statutory requirements under section 10 of the Act. You were also not advised of all of the exemptions that applied within the time for complying with section 1, under section 17.

10. On 18 October 2020, you submitted a request for an internal review, the text of which can be found at Annex A of this review.

Substance

11. As part of this review, I have looked at each part of your request again from first principles and my findings are outlined below.

Part 1: The final report of the Ministry of Defence investigation into the incident, including recommendations and lessons learnt.

Use of section 26 (defence)

12. Section 26(1) states that information is exempt if its disclosure under the Act would, or would be likely to, prejudice (a) the defence of the British Islands or of any colony, or (b) the capability, effectiveness or security of any relevant forces. Section 26 is a qualified exemption and is subject to a PIT. You were advised that some information was withheld under section 26(1)(b).

13. Release of information would demonstrate the MOD's commitment to transparency and openness in Defence matters. It would also provide reassurance to the public that such incidents are investigated thoroughly in order to ensure lessons are learned to avoid similar occurrences in the future. Disclosure would broaden public understanding of the investigative procedures followed by the RN when dealing with such an incident. There is also a long-standing public interest in the activities of UK nuclear submarines.

14. However, release of the requested information could provide tactical information in the way our submarine flotilla operates and could be used by hostile actors to undermine the effectiveness of our armed forces by targeting, disrupting or degrading a crucial element of our capability. Such disruption would impact on submarine operations. Release would prejudice the UK's ability to defend itself because it would prejudice the operational capability, effectiveness and security of the UK's submarine fleet. The level of prejudice for the exemption is engaged at the higher level of 'would' prejudice.

15. While the release of information would demonstrate MOD's commitment to transparency and openness, there is a public interest in the effective operation of the UK's submarine fleet. I find that the balance of the public interest lies strongly in favour of maintaining the section 26(1)(b) exemption and the information in scope of your request is correctly withheld. This exemption is closely linked to section 24 (national security) as outlined below.

Application of section 24 (national security)

16. Section 24(1) provides that information is exempt from the requirements of section 1 of the Act if it is necessary for safeguarding national security. I should advise that if there is a risk to the security and effectiveness of submarine operations, section 24(1) should also have been applied. Section 24 is a qualified exemption and is subject to a PIT.

17. The arguments for release are similar to those provided at section 26. There is a public interest in maintaining public confidence in the safe and effective operation of the UK nuclear submarine fleet, which is important for safeguarding national security. Again, release of the information would provide the public with assurance that effective measures are in place to deal with an incident aboard a nuclear submarine.

18. However, the information in scope of your request contains sensitive details on operational capabilities of the submarine which, if released, could be used by potential adversaries to undermine the operational effectiveness of the submarine fleet. Effective operational capability of the submarine platform is crucial to the delivery of the UK's nuclear deterrent which successive Governments have deemed essential for safeguarding national security. These factors heavily outweigh the arguments in favour of disclosure.

19. I therefore agree that while it is recognised that release of the final report into this incident would provide public reassurance that such incidents are investigated thoroughly in order to ensure lessons are learned to avoid similar occurrences in the future, there is also a compelling interest in ensuring that the security and effectiveness of our Armed Forces are not compromised or that national security is not undermined by the release of the information.

Part 2: Copies of all correspondence between the Ministry of Defence and Marine Accident Investigation Branch relating to the incident.

Section 44 (prohibitions on disclosure)

20. Section 44(1)(a) of the Act states that '*Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it— (a) is prohibited by or under any enactment.*' Section 44 is an absolute exemption and is not subject to a PIT.

21. Under section 16 (advice and assistance), you were advised that the enactment in question was 'The Merchant Shipping (Accident Reporting and Investigation) Regulations 2012³'.

22. Regulation 13 states at paragraph (2): "*the following documents or records whether held electronically, mechanically or otherwise must not be made available for purposes other than safety investigation, unless a Court orders otherwise ... (e) all correspondence received by the Chief Inspector from parties involved in a safety investigation*". Therefore, Regulation 13(2)(e) is the relevant statutory prohibition in this instance which engages the exemption under section 44(1)(a) of the FOIA.

23. I find that it is reasonable for MOD to take the view that Regulation 13(2)(e) covers all correspondence between MOD and MAIB and is therefore withheld accordingly.

24. I can, however, advise that Section 1.8 of the MAIB report contains an outline of some of the correspondence which meets the description of this part of your request and meets the public interest to some extent.

³ <https://www.legislation.gov.uk/ukSI/2012/1743/made>

Part 3: Please also inform me what corrective or disciplinary action was taken towards the Royal Navy submarine personnel involved as a result of the incident.

Section 40 (personal information)

25. I have looked again at the response provided to this part of your request from first principles. You have requested information relating to corrective or disciplinary action taken, which would clearly constitute the personal information of any individual against whom such action may or may not have been taken and it was more appropriate to neither confirm nor deny (NCND) whether or not the information was held. I have therefore considered whether confirming or denying that the requested information is held would be a breach of the DP Principles.

26. Section 40(5) of the Act 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 this case, under section 40(5B)(a)(i) of the Act, MOD neither confirms nor denies whether it holds the third party personal information in scope of your request because of MOD's duty to protect the privacy rights of individuals.

27. Section 40(5B)(a)(i) 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."

28. The first data protection principle is the most relevant, and states that '*Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject*'.

29. I find that it is appropriate for MOD to rely on section 40(5B)(a)(i) to neither confirm nor deny whether the information in scope of this part of your request is held as it would breach the data protection principles.

General – names/posts of junior officials

Section 40(2) (personal data)

30. I can confirm that some information held falls in scope of section 40(2) of the Act, which 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.

31. 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 a PIT, in determining whether the disclosure of some of the information held 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.

32. While there is a general public interest in the release of information, I find that this interest does not outweigh the requirement to protect the names of junior officials contained within some of the information, which if combined with other information, could lead to their identification.

33. I have taken into consideration the reasonable expectations of junior officials that their information, like any other former or current MOD employee, would not be made public. Therefore, some information is withheld under section 40(2) of the Act.

Section 16 (advice and assistance)

34. Section 16(1) of the Act places a duty on a public authority to provide advice and assistance, where possible, to those making or intending to make a request for information.

35. Having reviewed material in scope of your request, I have noted some information held by the MOD is the same or significantly similar to that which is contained within the Marine Accident Investigation Branch (MAIB) '*Report on the investigation of the near miss between the ro-ro ferry Stena Superfast VII and a submerged Royal Navy submarine in the North Channel on 6 November 2018*', which is available at <https://assets.publishing.service.gov.uk/media/5f0d7a44e90e070312c4c44e/2020-13-StenaSuperfastVII-RNSubmarine.pdf>.

36. In particular, the information that meets the public interest in this incident can be found in the sections within the MAIB report that describe:

- a. The incident: sections 1.2 (*Narrative*) and 2.3 (*The near miss*), except section 2.3.4 which relates to the ferry.
- b. The submarine: section 1.4.1 (*Vessel and crew*)
- c. The investigation: section 1.8 (*The Safety Investigation*) and
- d. The actions taken by the Royal Navy: section 4.1.1 (*Actions in response to this incident*).

37. Finally, I apologise that after such a long delay, I am unable to release any information to you.

Conclusion

38. In summary, I find that:

- a. Your request was not handled in accordance with the statutory requirements under section 10 of the Act. You were also not advised of all of the exemptions that applied within the timeframe required under section 17.
- b. For part 1 of your request, the information is correctly withheld under the exemptions at sections 24(1) (national security) and 26(1)(b) (defence) of the Act. Where information could be released, this has already been published verbatim, or in gist form within the MAIB's investigation report.
- c. For part 2, Regulation 13(2)(e) of the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 is the relevant statutory prohibition in this instance to engage the exemption under section 44(1)(a) (prohibitions on disclosure) under the Act.
- d. For part 3, it is more appropriate for MOD to rely on section 40(5B)(a)(i) to neither confirm nor deny whether or not the information in scope is held.
- e. Some personal information held is exempt from disclosure under section 40(2) of the Act.

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 stroke extending to the right.

Sandra Gardiner

18 October 2020 - Request for an internal review (received 19 Oct)

**Freedom of Information Act 2000: Request for internal review
Case FOI2020/08292**

I am writing to ask you to undertake an internal review of a recent request for information which I have made to the Ministry of Defence.

Background

1. On 18 July 2020 I wrote to the Defence Safety Authority with the following request relating to the near miss incident involving a Royal Navy submarine and the car ferry Stena Superfast VII in the North Channel on 6 November 2018 (<https://www.gov.uk/maib-reports/near-miss-between-ro-ro-ferrystena-superfast-vii-and-royal-navy-submarine>).

- The final report of the Ministry of Defence investigation into the incident, including recommendations and lessons learnt.
- Copies of all correspondence between the Ministry of Defence and Marine Accident Investigation Branch relating to the incident.
- Please also inform me what corrective or disciplinary action was taken towards the Royal Navy submarine personnel involved as a result of the incident.¹

2. The case was allocated reference number FOI2020/08292 within MoD and I eventually received a final response from Navy Command FOI section dated 22 September 2020.

3. The response advised me that information under the scope of my request was considered to fall within the scope of the exemptions under section 26 (defence), section 40 (personal information) and section 44 (prohibitions on disclosure) of the FOI Act and would therefore not be released.

4. While I am grateful to the personnel who have been involved in processing my request, I do not consider that the decision to withhold the information from release in full is correct, and I am therefore requesting an independent review of the case from first principles.

Grounds for review

Section 26 exemption

5. The Navy Command FOI section considers that release of the requested information “would allow potential aggressors to understand the way our submarine flotilla operates providing them with an opportunity to target, disrupt and degrade a crucial element of Armed Forces capability”. No detail has been provided as to how this might be the case, and I consider it unlikely that all of the information in the relevant documents will relate to submarine operations in this way. Information which does not compromise defence operations should be released in response to my request.

6. The Ministry of Defence has been able to release information and reports relating to safety incidents relating to the Royal Navy's nuclear submarine programme in the past without compromising national security or the operations of the armed forces in any evident way.

- The Ministry of Defence has published a large number and variety of Service Inquiry and Board of Inquiry reports at:
[https://www.gov.uk/government/collections/service-inquiry-si#board-of-inquiries-\(bois\)](https://www.gov.uk/government/collections/service-inquiry-si#board-of-inquiries-(bois))
- These include a number of inquiry reports relating to nuclear powered submarines, including a shooting incident on board HMS Astute, a grounding of HMS Astute, and a grounding of HMS Sceptre. Further Inquiry reports released by MoD about a grounding of HMS Superb, a grounding of HMS Triumph, a grounding of HMS Victorious, a grounding of HMS Trafalgar, and a collision involving HMS Tireless, are available through the National Archives at:
<https://www.gov.uk/government/publications/boards-of-inquiries-in-the-national-archives>
- In response to requests for information the Ministry of Defence was also able to release some details of the collision which took place in February 2009 between HMS Vanguard and the French submarine Le Triomphant (case 21-12-2011-141621-001 and Information Commissioner's decision notice FS50444068). This was a particularly sensitive incident. In addition, in response to request FOI2017/10608 the Ministry of Defence was able to release some information relating to a safety incident involving HMS Vanguard.

- Publication of a Marine Accident Investigation Branch report into the Stena Superfast VII incident has demonstrated that it is possible to release information about the incident in question without compromising defence operations.

7. It has therefore proved possible to release information about submarine safety incidents in the past without allowing potential aggressors to disrupt the Royal Navy's submarine flotilla, and there is a clear precedent for release of this type of information by the Ministry of Defence.

8. In conducting a public interest test on the application of the section 26 exemption it appears that important matters weighing in favour of release of the requested information have not been considered.

9. The safety of the Ministry of Defence's nuclear programme is a matter of considerable interest and it is in the Department's own interest to demonstrate that adequate measures have been taken to ensure the safety of Ministry of Defence and the general public. Publication of the requested information would help provide the necessary assurance.

10. Likewise, the safety of commercial shipping, and in particular passenger vessels, is a matter of considerable interest and it is reasonable to expect the Royal Navy to demonstrate that it has taken steps to ensure that its operations do not place shipping at risk.

Section 44 exemption

11. Navy Command also maintained that release of correspondence between the MoD and the Marine Accident Investigation Branch is exempt under section 44(1)a of the Freedom of Information Act by virtue of The Merchant Shipping (Accident Reporting and Investigation) Regulations 2012.

12. Neither the Freedom of Information Act 2000 nor the Information Commissioner's guidance on use of the section 44 exemption specifically mention the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012.

13. By my reading section 13 of the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 prohibits the Marine Accident Investigation Branch from releasing correspondence relating to investigation of this incident, but it does not prevent the Ministry of Defence from releasing correspondence sent by the Royal Navy to MAIB because the regulations do not relate to a function of the Royal Navy.

Section 40 exemption

14. Navy Command has withheld release of information on what corrective or disciplinary action was taken towards the Royal Navy submarine personnel involved as a result of the incident on the grounds that "legal and disciplinary records of individuals involved in the incident are held for administrative purposes only and not with the expectation that they would be made public".

15. The fact that records may be held for administrative purposes only without the expectation that they may be made public is irrelevant under the terms of the Freedom of Information Act. They represent information covered by section 1 of the Freedom of Information Act and must be released upon request unless it can be demonstrated that they are exempt from release. No explanation has been given as to why this information may be exempt.

16. It should not be difficult to explain what action was taken without disclosing names or any details which would allow identification of the individuals involved.

17. There is a strong public interest in demonstrating that the Royal Navy takes submarine safety seriously and takes measures to ensure that dangerous situations will not occur again. Under the present circumstances there is room for suspicion that no action has been taken and that the Ministry of Defence is attempting to hide this fact.

Information which is not covered by the above exemptions

18. I consider it unlikely that all the information in the requested documents, in their entirety, is covered by these four exemptions. Any information that is not explicitly covered by these exemptions must be released under the general right of access to information under section 1 of the Freedom of Information Act.

In the light of these matters, I should be grateful if you would undertake an independent review of my request for information and provide me with all information within the scope of my request which is not covered by exemptions under the Freedom of Information Act 2000.