

**FREEDOM OF INFORMATION ACT 2000 (SECTION 52)
ENFORCEMENT POWERS OF THE INFORMATION COMMISSIONER
ENFORCEMENT NOTICE**

DATED: 30 June 2023

To: Ministry of Defence

**Of: Whitehall
London
SW1A 2HB**

1. The Ministry of Defence ("**MOD**") is a "public authority" listed in Schedule 1 and defined by section 3(1)(a)(i) of the Freedom of Information Act 2000 ("**FOIA**"). FOIA provides public access to information held by public authorities.
2. The MOD's obligations as a public authority under FOIA include –
 - a. Being obliged to publish certain information about its activities;
 - b. Responding to requests for information from members of the public.
3. The Information Commissioner (the "**Commissioner**") hereby issues the MOD with an Enforcement Notice (the "**Notice**") under section 52 FOIA. The Notice is in relation to the MOD's
 - a. Continuing non-compliance with section 1(1) FOIA;
 - b. Continuing breach of section 10(1) FOIA.
4. This Notice explains the Commissioner's decision to take enforcement

action. The specific steps that the MOD is required to take are set out in **Annex 1**.

Legal Framework for this Notice

5. A person requesting information from a public authority has a right, subject to exemptions, to be informed by the public authority in writing whether it holds the information, and to have that communicated to him, if the public authority holds it. This is set out in section 1(1) FOIA–

“(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.”

6. Section 10(1) FOIA specifies that public authorities must respond to requests within 20 working days:

“... a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following receipt.”

7. There is provision under FOIA for a public authority to claim a reasonable extension to this limit in certain circumstances but in all cases, the public authority must give the requestor a written response within the standard time limit for compliance. That is to say, a public authority must confirm whether the information is held (subject to the application of an exemption), and if so, disclose it to the requestor,

(again subject to the application of an exemption).

8. The Commissioner has various powers under FOIA. One of these is the issuing of an Enforcement Notice. Section 52(1) of FOIA states –

“If the Commissioner is satisfied that a public authority has failed to comply with any of the requirements of Part I, the Commissioner may serve the authority with a notice (in this Act referred to as an “enforcement notice”) requiring the authority to take within such time as may be specified in the notice, such steps as may be so specified for complying with those requirements.”

9. Section 52 FOIA has effect subject to section 53 FOIA, which provides details of the exceptions from the duty to comply with a decision notice or enforcement notice.

Background

10. The Commissioner contacted the MOD in August 2019 and sought details about its processing of FOI requests. This was in view of the MOD’s timeliness performance set out in the central government FOI statistics.

11. The MOD responded on 16 September 2019 and acknowledged the Commissioner’s concerns regarding its timeliness figures as reported in the central statistics.¹ The MOD explained that it would prepare an action plan aimed at improving its timeliness rate to the ICO’s target of 90%. However, in order to set its recent FOI performance into context the MOD provided an explanation of how it processed FOI requests at

¹ For the period 1 January – 31 March 2019 the MOD responded to 85% of requests within the 20 working day deadline or within the permitted extension; for the period 1 April to 30 June 2019 that figure was 84%.

that time. It explained that given the size and complexity of the organisation, it operated a devolved approach to managing FOI requests. This places responsibility for responding with the business area which contains the relevant subject matter expertise. The MOD explained that it had a small Information Rights Team (IRT), including FOI operation staff who log and allocate 60% of requests received and provide policy advice. In addition, there are over 40 FOI focal points throughout the MOD based with subject matter experts. The focal points can also log requests and consult with subject matter experts to draft FOI responses and respond directly to requestors. The MOD explained that this model meant that responsibility for managing requests lay with the people best placed to access the relevant information and assess the potential harm that release could, or would, pose. Albeit the MOD noted that focal points and subject matter experts that are tasked with managing requests received under FOI and the Environmental Information Regulations (EIR) are not dedicated to this role and will have other tasks and priorities placed on them.

12. With regard to the Commissioner's concerns about its timeliness in responding to requests, the MOD explained that there were a variety of factors affecting this aspect of its performance. These included the complexity of requests received, the sensitive nature of material held and the time and effort it invested in providing high quality responses to requestors. On this latter point the MOD noted that in comparison to other government departments it received significantly fewer internal reviews and also had a higher rate of appeals to the Commissioner which were concluded in its favour. It also noted that it responded to a greater portion of requests with a full disclosure in comparison to some other government departments.

13. As part of its response of 16 September 2019 the MOD also acknowledged that it had an unacceptable number of overdue

requests; 174 requests over 6 months old and 110 requests over 12 months old, with the oldest request being 8 January 2014. The MOD explained that its IRT had been liaising with focal points to address these but due to resource limitations and competing priorities it had been unable to conduct detailed investigations and discussions with the relevant areas. However, it had assigned a member of the IRT to lead on this issue and liaise with focal points to bring the number of late requests down.

14. The MOD provided its action plan to the Commissioner on 1 October 2019. In respect of the overdue requests, the MOD confirmed the IRT now had a designated lead within the team for this issue and engagement had begun with focal points to review overdue requests assigned to their areas. The MOD noted that it was difficult to provide a specific target date by when the requests would be cleared, given the high volumes of requests received and the need to achieve a 90% timeliness figure in respect of new requests. However, the MOD noted that this would be a major focus of future FOI performance improvement.

15. The MOD subsequently provided the Commissioner with updated performance statistics for July 2020 which confirmed that the oldest open request remained that received on 8 January 2014, 341 requests were over 6 months old and 247 requests were over 12 months old.

16. The Commissioner contacted the MOD on 8 October 2020 and expressed concern again about the number and age profile of outstanding requests and asked the MOD to provide an updated action plan in relation to these.

17. The MOD provided this plan on 26 February 2021. The MOD noted that its efforts to implement actions to reduce the number of late

requests set out in the previous action plan of October 2019 had been significantly hampered by the effect of the Covid-19 pandemic. The revised action plan emphasised that it was important to note that the work on these late requests had to be balanced with ensuring timeliness targets on new requests were met and the quality of responses maintained. The MOD also noted its FOI operations team was relatively small and that the organisation received 4,500-5000 requests per year. In terms of the outstanding requests the plan explained that an assessment of these revealed that many were often complicated and challenging, with material either held across various areas of the organisation and/or of particular sensitivity. In terms of steps to address these requests, the plan explained that the FOI operations team had renewed its liaison with the focal points and was providing advice on all requests over 6 months old. The plan also set out details of how the MOD had been undertaking a triage of the oldest requests. The MOD explained that it was difficult to provide a deadline by which all requests would be responded to, but envisaged a month on month drop in the number. At this point the MOD explained that it had 212 requests that were over 12 months old (ie requests received between January 2014 and January 2020²).

18. The MOD and Commissioner met to discuss this plan in March 2021 with the Commissioner providing views on various aspects of it and steps the MOD could also consider taking as part of the plan. The Commissioner asked the MOD to provide bi-monthly statistics on the overdue requests along with updates on the steps being taken as part of the action plan.

19. The MOD sent such updates through to the Commissioner on 4 June 2021 and 23 August 2021. The MOD and Commissioner met again to

² Details of the statistical returns subsequently provided to the Commissioner in relation to the late requests are set out in Annex 2 to this Notice.

discuss progress on 16 September 2021 with the MOD explaining details of further steps taken, including the approaches and techniques being applied to the triaging of requests along with details of its work with FOI focal points.

20. The MOD provided the Commissioner with updated statistics on 1 December 2021 and details of further work being undertaken, again focusing on details of triage work, liaison with focal points and how the late requests issue was being reported on at a senior level internally.

21. The Commissioner contacted the MOD on 18 February 2022 and confirmed that updates on progress regarding the late cases were still needed.

22. The MOD provided its next return on 13 April 2022 and also included details of 12 month old requests not caught by the original tranche using the base line taken in early 2021 ie 'late cases 1' (LC1). Again, the MOD's response included narrative details of progress made including updates on key themes from the triaging of requests and liaison with focal points. It also noted that recent recruitment of an additional member of staff into the IRT meant that it was able to actively pursue all late requests.

23. The Commissioner responded on 29 April 2022 and noted the progress that had been made in reducing the number of requests in LC1, but explained that he was concerned about the profile of the outstanding requests (three were still open from 2015 as well as a greater number of requests that were still five and six years old respectively). In light of this, the Commissioner explained that he wished to set a target date by when the oldest requests would be responded to.

24. The Commissioner held a meeting with the MOD on 12 May 2022 to discuss the late cases issue following which the MOD agreed to provide a further action plan designed to clear all requests that were over 12 months old.

25. The MOD provided this plan to the Commissioner on 30 August 2022. The MOD explained that the number of LC1 requests now stood at 52. However, the number of open requests received between 1 February 2020 to 31 December 2021 ('late cases 2', or 'LC2') stood at 168. The action plan aimed to close all LC1 and LC2 cases within 12-15 months, ie between August 2023 and November 2023. In terms of the actions taken to achieve this the plan set out details of revised approaches to the triaging work on the requests, details of the engagement work with focal points, reporting of late cases at a senior level and increased communication from IRT to the MOD defence community, including revised training courses. The MOD noted that the steps taken in the plan aimed not only to address LC1 and LC2 but also to ensure the resilience of FOI performance for future requests received across the department.

26. The Commissioner met with the MOD to discuss the plan on 6 September 2022. The Commissioner asked the MOD to ensure that it continued to provide regular updates on progress in respect of both LC1 and LC2. Following the meeting the Commissioner provided the MOD with a link to a blog from July 2020 which discussed the Commissioner's new FOI and transparency regulatory manual.³

27. Further updates were provided by the MOD to the Commissioner on

³ <https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2022/07/director-s-update-looking-at-the-future-of-freedom-of-information-foi-through-ico25/>

17 October 2022, 27 October 2022, 12 December 2022 and 7 March 2023. These updates included revised statistical returns but also provided further narrative descriptions of the progress against the August 2022 action plan, including confirmation that analysis had been undertaken of all overdue requests in order to ensure progress could be made on them.

28. The Commissioner met with the MOD again on 20 April 2023 to discuss progress. The Commissioner sought clarity from the MOD as to whether the timescales within the action plan of August 2022 would be met, ie all LC1 and LC2 requests being closed by August to November 2023. The MOD confirmed that it was optimistic that this could be achieved. It noted that all requests were being worked on, that relations between the IRT and the focal points were very positive and this relationship was continuing to work well, and that month on month the numbers of requests was steadily falling.

29. However, the MOD explained that it still could not necessarily guarantee that all requests would be closed within the timescale of the plan and that the balance remained between responding to the older requests while managing new requests and ensuring that these were responded to in a timely manner.

30. In a further discussion with the MOD on 15 June 2023 it was able to provide the Commissioner with a reassurance that requests within LC1 and LC2 would be closed within the timescale of the action plan, ie by 30 November 2023. However, the Commissioner remains significantly concerned about the extreme age of some requests, which remain unacceptable.

The Contravention and Reasons for this Notice

31. As detailed above, despite the MOD's focus on addressing the old requests, at the point of its latest statistic return to the Commissioner⁴ it still had unanswered requests dating back as far as 2018 and 58 requests unanswered from the period 1 February 2020 to 31 December 2021. The Commissioner recognises that the MOD's action plan aims to have closed all of these requests by November 2023 at the latest. The purpose of this Notice is to act as a backstop to ensure that these requests are cleared by 30 November 2023. The Commissioner considers this an essential step to take given the extended time the MOD have been allowed to address these requests.

32. Nevertheless, the Commissioner does wish to place on record the positive engagement he has had with the MOD's IRT on this issue. It is clear from the action plans provided to him by the MOD, and his discussions with members of the MOD's IRT, that they are committed to addressing this issue. Their efforts to do so have been carefully focused and led by their detailed knowledge of FOI within their organisation. Suggestions made by the Commissioner at various stages as to how the approach to these requests could be modified or adapted have been appropriately considered by the MOD. The Commissioner also recognises that the MOD's efforts in relation to these requests have had a clear impact. The LC1 figure has dropped from 212 in February 2021 and as of 28 June 2023 stood at 15; the LC2 figure was 168 in August 2022 and as of 28 June 2023 stood at 58.

33. The Commissioner considers that the action plan of August 2022, both in terms of the steps it includes and its timescale, to be reasonable taking into account the various circumstances set out above. In his

⁴ Provided on 28 June 2023.

discussions with the MOD about this issue, and his assessment of the various action plans put forward, the Commissioner has also taken into account his regulatory posture during the Covid pandemic from March 2020 to early 2022, namely as a pragmatic and empathic regulator.⁵ The Commissioner's acceptance of the August 2022 action plan is also why, in contrast to other recent enforcement notices, he is not requiring the MOD to revise or update this plan as part of the steps required in response to this Notice.

34. The Commissioner also considers that the MOD's performance in respect of the old, unanswered requests should be seen in the context of the factors the MOD highlighted in its response of September 2019 when setting into context its timeliness performance. Throughout the time period of the Commissioner's engagement with the MOD covered by this Notice, based on the evidence available to him, the quality of the MOD's initial responses to requests, and the quality of its internal reviews has remained high.

35. The Commissioner notes that the MOD's timeliness performance for this period in respect of new requests has marginally improved. In 2020 this stood at 82% of requests answered in time, or with a permitted extension⁶; the figure for 2021 was 84%⁷ and for 2022 was 86%⁸. The Commissioner also notes, however, that in addition to the

⁵ <https://ico.org.uk/about-the-ico/media-centre/blog-regulating-through-a-pandemic-and-beyond/#>

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https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F981645%2Ffoi-statistics-2020-statistical-tables.xlsx&wdOrigin=BROWSELINK

⁷

https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F1071223%2Ffoi-statistics-annual-2021-statistical-tables.ods&wdOrigin=BROWSELINK

⁸

https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data

outstanding overdue requests, this does still remain behind the stated target the MOD set out in 2019 of reaching 90%.⁹

36. The Commissioner is also aware that the MOD's IRT is involved with the management of access to service records of deceased service personnel. During the period described in this Notice, in addition to the challenges posed in terms of the significant volumes of applications for such records which are reported separately, the MOD has also taken steps to modify the route by which access to such records is made, primarily the removal of the charge for such records in April 2023. In addition to the changes to the MOD's own arrangements for such records, work has continued on the project of transferring millions of service records to The National Archives. The Commissioner appreciates that projects involving the service records have also made a significant demand on the resources of the IRT at the MOD.

37. Taking the above into account the Commissioner considers it a proportionate regulatory step to now issue an Enforcement Notice requiring the MOD to comply with section 1(1) of FOIA in respect of all outstanding requests in the categories LC1 and LC2.

38. In issuing this Notice the Commissioner acknowledges that he is not requiring the MOD to respond to all overdue requests, ie requests that were submitted to it after 31 December 2021. This is because at this stage it is only those in categories LC1 and LC2 that he considers warrant formal regulatory action given that the MOD has already produced an action plan covering these requests, a plan which the Commissioner considers must be delivered by 30 November 2023. The

[%2Ffile%2F1153929%2Ffoi-statistics-annual-2022-statistical-tables.ods&wdOrigin=BROWSELINK](#)

⁹ Statistical returns provided to the Commissioner on 14 June 2023 show that the MOD's timeliness rate for the months February, March and April 2023 were 87%, 89% and 87% respectively.

Commissioner will continue to liaise with the MOD in respect of any outstanding requests it has received since 1 January 2022.

Terms of this Notice

39. The Commissioner therefore exercises his powers under section 52 of FOIA to serve an Enforcement Notice requiring the MOD to take specified steps to comply with FOIA. The specified steps are set out in **Annex 1** of this Notice.

40. The consequence of failing to comply with an Enforcement Notice is that the Commissioner may make written certification of this fact to the High Court pursuant to section 54 of FOIA. Upon consideration and inquiry by the High Court, the MOD may be dealt with as if it had committed a contempt of court.

Right of Appeal

41. By virtue of section 57 of FOIA there is a right of appeal against this Notice to the First-tier Tribunal (Information Rights). If an appeal is brought against this Notice, it need not be complied with pending determination or withdrawal of that appeal.

42. 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

Email: GRC@justice.gov.uk

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

43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Enforcement Notice is sent.

**Phillip Angell
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Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Annex 1

TERMS OF THE ENFORCEMENT NOTICE

THIS NOTICE REQUIRES THE MOD TO TAKE THE FOLLOWING STEPS BY NO LATER THAN 30 NOVEMBER 2023:

- (i) In respect of each outstanding information request in the categories LC1 and LC2 comply with section 1(1)(a) of FOIA and, if information of the description specified in the request is held, either
- (ii) communicate it pursuant to section 1(1)(b) of FOIA; or issue a valid refusal notice under section 17 of FOIA, unless section 17(6) of FOIA applies.

Annex 2

Date of performance return to ICO	Number of open requests received between January 2014 and January 2020 (ie 'LC1')	Number of open requests received between February 2020 and December 2021 (ie 'LC2')	Date of oldest open request
26/02/21	212		January 2014
4/06/21	196		February 2014
23/08/21	168		January 2015
1/12/21	141		January 2015
13/04/22	93	112 (of which 88 were received between 1/2/20 to 31/12/20 with 24 received between 1/1/21 and 31/03/21)	2015
12/05/22	81	Not reported	2015
30/08/22	52	168 (of which 73 were received between 1/2/20 to 31/12/20 with 95 received between 1/1/21 to 31/12/21 ¹⁰).	2015
17/10/22	42	Not reported	2015
27/10/22	Not reported	156	2015
12/12/22	33	128	2015
17/02/23	26	97 (of which 38 were received between 1/2/20 to 31/12/20 with 59 received between 1/1/21 to 31/12/21)	2015
14/06/23	17	66 (of which 25 were received between	2016

¹⁰ The latter figure increased from 24 to 95 because the date range from which these requests was reported extended from 31/03/21 to 31/12/21.

Reference: ENF0987658

		1/2/20 to 31/12/20 with 41 received between 1/1/21 to 31/12/21)	
28/06/23	15	58	2018