

Freedom of Information Act 2000 (Section 51) Information notice

Date: 28 February 2022

Public Authority: Ministry of Defence

Address: Whitehall

London SW1A 2HB

Section 51

Under section 51 of the Freedom of Information Act 2000 (FOIA), which is set out below, the Information Commissioner (the Commissioner) has the power to serve a notice on a public authority requiring it to furnish him with any information he requires to enforce the requirements of FOIA.

- 51. (1) If the Commissioner -
 - (a) has received an application under section 50, ...

he may serve the authority with a notice (in FOIA referred to as "an information notice") requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.

Application under section 50

1. The Commissioner has received an application under section 50, reference IC-70602-G4Z0, for a decision as to whether a request for information made by the complainant to the Ministry of Defence (MOD) on 18 February 2020, has been dealt with in accordance with the requirements of Part I of FOIA.



Nature of complaint

2. The complainant submitted the following request to the MOD on 18 February 2020:

'For each meeting Andrew Sabisky had with defence officials, please provide:

- A full list of attendees, including the full names and titles of each attendee, as well as who each attendee represents
- The exact time, date and duration of when the meeting took place
- The location of the meeting
- A description of what was discussed in the meeting
- A copy of the agenda for the meeting
- Materials that were handed out and received during the meeting, such as presentation slides, brochures, reports, and leaflets
- Minutes taken during the meeting, as well as any accompanying briefing notes and papers

I would like to receive this information in an electronic format. If you feel that a substantive response to this request is not possible within a reasonable time frame, I would be grateful if you could contact me and provide assistance as to how I can refine the request. If you need any clarification, please contact me. I look forward to receiving a response in 20 working days.'

- 3. The MOD contacted the complainant on 3 March 2020 and acknowledged receipt of her request. It explained that it was seeking to rely on the exemptions contained at sections 24(2) (national security), 26(3) (defence), 35(3) (formulation or development of government policy) and 43(3) (commercial interests) of FOIA to refuse to confirm or deny whether it held any information falling within the scope of the request. However, the MOD explained that it needed additional time to consider the balance of the public interest test.
- 4. The MOD provided the complainant with a substantive response to her request on 1 September 2020. The MOD confirmed that it held some information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of sections 35(1)(a) and 43(2) of FOIA and that the public interest favoured maintaining these exemptions.



5. The complainant contacted the MOD on 8 September 2020 and asked it to conduct an internal review of this response.

- 6. The MOD informed her of the outcome of the internal review on 5 May 2021. The MOD noted that the request had specifically sought information about meetings Andrew Sabisky had with Defence officials and that the initial response stated that no information was held falling within the first part of the request which sought 'A full list of attendees, including the full names and titles of each attendee, as well as who each attendee represents'. The MOD explained that a Written Ministerial Statement had confirmed that Mr Sabisky was hired as a contractor between 10 and 17 February 2020 by the Cabinet Office. However, the MOD explained that following a comprehensive search for the purposes of the internal review within the relevant MOD business units, no recorded information was located which confirmed that Mr Sabisky attended any meetings with Defence officials during the relevant period. Therefore, under section 1 of FOIA the MOD explained that the correct response to the request was that information falling within the scope of it was not held.
- 7. By way of an explanation of its previous position that information was held the MOD stated that:

'I can advise that the responses you received were based on corporate knowledge, rather than recorded information. During the eight days of Mr Sabisky's employment, there were two meetings attended by senior Defence officials where it is possible that he could have been present. The consideration and application of exemptions to withhold the information relating to those meetings were conducted in good faith. However, as the MOD holds no recorded information confirming that Mr Sabisky did attend either of these meetings, it was not reasonable to assume that the information about these meetings fell in scope of your request.'

- 8. The complainant contacted the Commissioner 12 November 2020 in order to complain about its handling of her request. She argued that MOD was likely to hold information falling within the scope of her request; she was unhappy with the time it took the MOD to issue its initial response and to complete the internal review; and she was concerned with the involvement of the Clearing House in this request because she believed that this caused the delay in the MOD issuing its response.
- 9. The Commissioner contacted the MOD on 3 August 2021 in relation to this complaint. The Commissioner asked the MOD to provide a response

¹ https://guestions-statements.parliament.uk/written-guestions/detail/2020-02-21/18476



to a number of questions so that he could consider the grounds of complaint set out above. The Commissioner asked for a response within 20 working days.

- 10. The MOD contacted the Commissioner and the complainant on 2 September 2021 and explained that as result of this complaint further searches had been conducted and confirmation that Mr Sabisky attended at least one meeting with Defence officials in February 2020 had now been ascertained. The MOD apologised that the original searches, conducted prior to the completion of the internal review, failed to locate this information. The MOD offered to conduct a fresh review that would consider the application of the material that has been confirmed to fall within the scope of the request. The MOD explained that it aimed to complete the review within 20 working days, ie by 30 September 2021, and that if this was not possible it would update both the complaiant and Commissioner accordingly.
- 11. The Commissioner contacted the MOD on 3 September 2021 and agreed that given the circumstances it was appropriate for the MOD to conduct a further review focusing on the information that was now in scope. The Commissioner explained to the MOD that if it concluded that any of the information was determined to be exempt from disclosure, then he asked the MOD to provide him with a copy of that information and detailed submissions to support the application of the applicable exemptions. The Commissioner asked the MOD to ensure that any exempt information and submissions were sent to him at the point that the further review was provided to the complainant.
- 12. The MOD contacted both parties on 30 September 2021 and confirmed that having reviewed the material in scope it considered this to be exempt from disclosure on the basis of sections 26(1) (defence) and 35(1)(b) (Ministerial communications) of FOIA, and further that some information may be exempt from disclosure on the basis of sections 36(2)(b) and (c) (effective conduct of public affairs) of FOIA. The MOD explained that given the complex nature of the requests it required additional time to consider the public interest tests and aimed to do so by 28 October 2021.
- 13. The MOD issued similar holding responses on 28 October and 30 November 2021.
- 14. The Commissioner contacted the MOD on 17 January 2022 and asked for an update on its progress in relation to completing the further internal review and preparing a response for the Commissioner setting out its revised position. The Commissioner explained that given the need to progress his investigation he was considering issuing an Information Notice.



15. Having not received a response from the MOD, the Commissioner contacted it on 2 February 2022 and explained that if he did not receive a response setting out its revised position by 11 February 2022 he would issue an Information Notice.

- 16. The MOD contacted the Commissioner on 2 February 2022 and explained that regrettably it did not appear to have received his email of 17 January 2022, and assured the Commissioner that if it had done so it would have responded. The MOD explained that it would contact the Commissioner shortly to discuss the case.
- 17. The Commissioner responded on 3 February 2022 and explained that as his email of 17 January 2022 was not received, he acknowledged that it would not be appropriate to issue an Information Notice if no response was received by 11 February. Instead the Commissioner agreed to discuss this matter further with the MOD.
- 18. The Commissioner did so on 11 February 2022 and confirmed that if a response was not received by 21 February 2022, then an Information Notice would be issued.
- 19. To date, the Commissioner has not received a response from the MOD setting out its substantive revised position in relation to this request.

Information required

- 20. In view of the matters described above the Commissioner hereby gives notice that in the exercise of his powers under section 51 of FOIA he requires that the MOD shall, within 30 calendar days of the date of this notice, furnish the Commissioner with a copy of the following information:
 - A copy of its further internal review response which it committed to undertake following its determination in September 2021 that it held information in the scope of the request.
 - A complete and unredacted copy of the information determined to be in the scope of the request, confirmation of how any exemptions are being applied to this information and detailed submissions to support the application of these exemptions.
 - If the MOD is seeking to rely on section 36 of FOIA, then the Commissioner requires a copy of the submission provided to the qualified person and a copy of the qualified person's opinion.



Failure to comply

21. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of FOIA, and may be dealt with as a contempt of court.



Right of appeal

22. There is a right of appeal against this information notice to the First-tier Tribunal (Information Rights). Information about the appeals process can 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-

<u>chamber</u>

23. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this information notice is sent. If Notice of Appeal is served late the Tribunal will not accept it unless it is of the opinion that it is just and right to do so by reason of special circumstances.

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