

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 28 March 2024

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking the evidence base for the decision to terminate a memorandum of understanding (MOU) with the League Against Cruel Sports. The MOD disclosed two photographs falling within the scope of the request but sought to withhold three further photographs on the basis of regulation 12(3) (personal data) of the EIR.
2. The Commissioner's decision is that one of these photographs does not constitute personal data and therefore is not exempt from disclosure on the basis of regulation 12(3). However, he is satisfied that the remaining two photographs do constitute personal data and furthermore that they are exempt from disclosure on the basis of regulation 12(3).
3. The Commissioner requires the MOD to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of "photograph 1".¹

¹ As described at footnote 5 below.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant submitted the following request to the MOD on 8 February 2023:

“...a summary of the evidence on which the MOU was terminated. For the avoidance of doubt, this request is made under the Environmental Information Regulations 2004.”²

6. The MOD responded on 14 March 2023 and explained that it did not hold any information falling within the scope of the request.
7. The complainant contacted the MOD on 16 March 2023 and asked it to conduct an internal review of this response.
8. The MOD provided the complainant with the outcome of the internal review on 18 May 2023. It explained that further searches had located information in the scope of the request and it had instructed the appropriate area of the department to provide a revised response to the request. The MOD explained that this response should be issued by 18 June 2023.
9. The complainant did not receive a response within this timeframe and therefore the Commissioner issued a decision notice on 20 September 2023 requiring it to issue this fresh response.³
10. This response was issued on 20 October 2023. The MOD disclosed some information falling within the scope of the request, namely two photographs, but explained that further information was being withheld on the basis of regulation 12(3) of the EIR.

² The MOU in question was between the MOD and League Against Cruel Sports. The Commissioner understands that the MOU allowed the League Against Cruel Sports to monitor trail hunting on MOD land.

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4026866/ic-241276-g8k8.pdf>

Scope of the case

11. The complainant contacted the Commissioner on 27 October 2023 in order to complain about the MOD's handling of this request, more specifically the complainant challenged the MOD's reliance on regulation 12(3) to withhold the further information falling within the scope of the request.
12. In support of their position the complainant noted that the material previously disclosed by the MOD related to members of an entirely different organisation (the Hunt Saboteurs as opposed to the League Against Cruel Sports, a registered charity) and it is unclear whether the photographs were even taken on MOD owned/managed land and, if so, when.

Reasons for decision

Regulation 12(3) / regulation 13(1) personal data

13. The information which the MOD is seeking to withhold consists of three further photographs.
14. Regulation 12(3) of the EIR exempts personal data from disclosure under the EIR where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
15. In this case the relevant condition is contained in regulation 13(2A)(a)⁴. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
17. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

⁴ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

Is the information personal data?

18. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

20. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

21. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

22. The MOD explained that it was not known who the individuals are within the three photographs but argued that it is entirely possible that some of the individuals in them could be identified, including from the clothing they are wearing.

23. The Commissioner has considered the photographs in question. In relation to photograph 1⁵, the Commissioner does not consider it at all likely that any of the individuals pictured in this could be identified from it. The individuals in question are not wearing clothing of any distinction, and nor are there any other details in the photograph that would give any indication as to the location or point in time when this picture was taken. As a result, the Commissioner does not accept that the photograph contains personal data. This photograph cannot therefore be exempt from disclosure on the basis of regulation 12(3) of the EIR.

24. In relation to the photograph 2⁶, the Commissioner accepts that there is a possibility, albeit a remote one, that some of the individuals in question could be identified from this given the clothing some are wearing and other features within the photograph. Finally, in relation to

⁵ By which the Commissioner means the photograph which appears at the top of page 1 of the pdf document provided to him by the MOD on 16 February 2024.

⁶ By which the Commissioner means the photograph which appears at the bottom of page 1 of the pdf document provided to him by the MOD on 16 February 2024.

the photograph 3⁷, the Commissioner accepts there is a genuine likelihood of the individual pictured in this being identified if this was disclosed. The Commissioner therefore accepts that the information falling within the scope of photographs 2 and 3 is personal data for the purposes of section 3(2) of the DPA.

25. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

26. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

27. Article 5(1)(a) of the GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

28. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

29. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

30. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“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”⁸.

⁷ By which the Commissioner means the photograph which appears on page 2 of the pdf document provided to him by the MOD on 16 February 2024.

⁸ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

31. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
32. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

33. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
34. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
35. The Commissioner accepts that there is a legitimate interest in understanding the basis upon which the MOU in question was terminated. This is particularly the case given that the two photographs previously disclosed by the MOD were not, as the complainant noted,

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

pictures of members of the League Against Cruel Sports, and moreover it is not clear where or when such pictures were taken.

Is disclosure necessary?

36. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
37. The Commissioner accepts that in order for the full evidence which supported the decision to terminate the MOU to be accessible, disclosure of all of the information in the scope of the request is necessary.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

38. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
39. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
40. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
41. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
42. The MOD explained that of the three photographs that were withheld it had been unable to establish if they were, or had been, in the public

domain. However, it considered that there was the potential that the individuals captured in these pictures would wish their identity to be protected – given that some had taken steps to hide their identification from public view. Furthermore, the MOD argued that in view of this, and given that the images were used to determine its position on the cancellation of the MOU, the individuals would not want such photographs to be disclosed. As a result, in the MOD's view disclosure of the photographs under the EIR would not be fair or lawful.

43. As noted above, following the disclosure of two photographs by the MOD in October 2023, the complainant highlighted that these were pictures of members of an entirely different organisation to the League Against Cruel Sports, and moreover it was not clear where, or when, such pictures had been taken including whether this was even on MOD land.
44. During the course of his investigation the Commissioner asked the MOD to clarify the basis on which it had determined that the five photographs in question fell within the scope of the request. In response the MOD noted that the request was for recorded information which constituted the evidence on which the decision, by the former Secretary of State (SofS), Ben Wallace, was taken to terminate the MOU with League Against Cruel Sports.
45. The MOD explained that during the processing of the original request, the Defence Infrastructure Organisation and the Finance and Military Capability organisation conducted a review of their record holdings, and no information could be located in respect of evidence provided to the SofS which resulted in the decision to cancel the MOU. However, the MOD explained that subsequently at the internal review stage, a Special Advisor to the SofS confirmed that some information was held that indicated his decision was based on five photographs in particular that had been located following a personal search of information found in the public domain.
46. The MOD explained at the point of its response to the Commissioner that as the SofS and Special Adviser are no longer at the MOD it was unable to confirm the origin of these photographs. As such it erred on the side of caution to withhold photographs it had been unable to determine were definitively in the public domain.
47. The MOD also explained that its understanding was that it was not determined that the individuals in five photographs in the scope of the request were/are members of the League Against Cruel Sports or if the events depicted took place on MOD land. The MOD explained that the pictures that were located were perceived to demonstrate the types of behaviour and attire, from any group, that could take place on the MOD estate as a result of individuals becoming aware of information that was

being released via the MOU regarding the dates of the hunts on MOD land. The MOD further explained that the SofS at the time decided that the concerns of such behaviour occurring on MOD land and the associated risks and burden this brought, was sufficient grounds to cancel the MOU.

48. The Commissioner accepts that disclosure of photographs 2 and 3 would be very likely to be against the expectations of those captured in them. In support of this point, he notes that a number of the individuals in question have taken steps to attempt to mask their identity. Furthermore, the Commissioner accepts a potential consequence of disclosure of the information is that the actions of these individuals, as depicted in the photographs, becomes associated with the decision to cancel the MOU.
49. With regard to the legitimate interest in disclosure, as set out above, the Commissioner accepts that there is an interest not only in the League Against Cruel Sports, but also the wider public, being able to understand the evidence used to reach the decision to cancel the MOU. However, in the Commissioner's view the disclosure of some of the information in the scope of the request in October 2023 goes some way to addressing this interest.
50. Furthermore, in the Commissioner's view disclosure of photographs 2 and 3 would not materially further this interest. In reaching this finding the Commissioner would emphasise the points made to him by the MOD as set out above at paragraph 47. The Commissioner can confirm that the disclosure of the photographs in question would not provide any insight as to whether they were taken on MOD land or at what point in time. Nor is it at all clear to the Commissioner whether the photographs in question actually represent members of the League Against Cruel Sports.
51. In view of this limited insight which disclosure of the two photographs would provide, and given that in view of the comments above it is already clear that the evidence base, in part, for terminating the MOU took into account photographs of individuals and a group different to the League Against Cruel Sports (ie the photographs disclosed in October 2023), the Commissioner has therefore determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
52. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

53. The Commissioner has therefore decided that the MOD was entitled to withhold photographs 2 and 3 under regulation 13(1), by way of regulation 13(2A)(a). However, it is not entitled to rely on these provisions to withhold photograph 1 and this must therefore be disclosed.

Right of appeal

54. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). 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

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

55. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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