

# Ministry of Defence Access to Information Guidance Note

Version 6

March 2009

## Guidance Note A3: Summary of the Freedom of Information Act 2000

### Purpose of the Act

1. Since 1 January 2005 all requests for information received by a public authority have had to be answered in accordance with the Freedom of Information Act 2000 or the Environmental Information Regulations 2004. For many years government departments have been required to respond to request for information in accordance with the Code of Practice on Access to Government Information and the EIRs 1992. The access legislation is a culture change from 'need to know' to 'right to know'. Greater openness and transparency establishes a greater public trust and confidence in government.

1.2 Underpinning the FOI Act are two key ideas;

- that the better informed the electorate is about the actions of government, the greater the legitimacy conferred on government by elections
- that facilitating public participation in the decisions to be taken by public authorities is likely to lead to better government.

The Government's aims for the Act are to instil a culture of openness in public authorities, while maintaining a balance in protecting information that should be rightfully withheld, thereby enabling them to serve the public more effectively and increase people's trust in the institutions that act on their behalf.

1.3 The Act's title states that it is: "An Act to make provision for the disclosure of information held by public authorities or by persons providing archiving services for them and to amend the Data Protection Act 1998 and the Public Records Act 1958; and for connected purposes." It is important to note that the long title makes clear that the FOI Act provides "for" the disclosure of information, which together with sections 1 & 2 of the Act indicates a positive pre-disposition towards disclosure of information. Lord Falconer stated the Government's view during the House of Lords Report stage debate: "beyond doubt the Government's resolve" is that "information must be disclosed except where there is an overriding public interest in keeping specific information confidential."

### Key points to note:

- The FOI Act places an obligation on public authorities to make information available on both a proactive and a reactive basis.
- The Act imposes a duty to provide advice and assistance to applicants.
- Any request for recorded information must be handled in accordance with the statutory requirements of the FOI Act. The requestor does not have to mention the FOI Act when making a request.
- Requests can be made by anyone, anywhere in the world.
- FOI requests must be in legible writing (includes e-mail or fax), have a name and address for return correspondence and describe the information wanted. Under the EIRs, requests for environmental information may be verbal. See Guidance Note [B4: Applying the EIRs](#).
- Requesters do not have to explain why they want the information, nor may information be withheld on account of any use the applicant is expected to make of it.
- The right of access applies to all recorded information held at the time a request is made.
- Information can be in any recorded format - on a file, a database, as a printed report, on disc, in the form of a photograph, video or any other medium.
- If the requested information is not held, there is no obligation to create it.

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- The Act is blind to where the information originated. It may be provided by contractors, allies, international organisations and other government departments. If it is held within MOD, or held by another body on behalf of MOD, it is within the scope of the Act.
- Authorities are required to respond to requests within 20 working days either by providing the information; or by explaining, as fully as possible, why the request has been refused or is being delayed. Any notification that a public interest test is being considered must also be sent within 20 working days.
- The response time begins when a request is received by any unit or person in the MOD.
- That information has a protective marking is not a valid reason to refuse a request.
- It is an offence to alter, deface, block, erase, destroy or conceal any item with the intention of preventing disclosure of any or all of the information to which the applicant is entitled. An individual officer found guilty of this offence is liable, on conviction, to a fine of up to £5,000. Following MOD rules and guidance will not expose staff to any risk of offence. However, failure to follow MOD rules could result in personal liability.
- Retain RFIs, responses and a full audit trail in reaching any decision to withhold for five years.
- Inclusion of a Class of Information in the Publications Scheme incurs a statutory obligation to make that information available proactively.

### The main provisions of the FOI Act

#### The rights of access

2. Section 1 of the Act creates a statutory right of access to information held by public authorities. Any person making a request is entitled:

- a) to be informed in writing by the public authority whether or not it holds information as described in the request, (described in the Act as 'the duty to confirm or deny') and if that is the case,
- b) to have that information communicated to him.

2.1 There may occasionally be cases when it is appropriate to refuse to confirm or deny that the information is held. Generally this is the case when to confirm or deny that the information is held would in itself be exempt information.

See Guidance Note [D7: The duty to confirm or deny](#).

#### Publication Schemes

3. As well as requiring public authorities to respond to requests for information, the FOI Act requires them to release information proactively. Under s.19 of the Act every public authority must obtain the Information Commissioner's approval of a Publication Scheme setting out the classes of information it accepts a commitment to publish on an ongoing basis, saying how that information can be obtained and specifying any charge. The authority is under a statutory duty to maintain and comply with the scheme.

3.1 The MOD publication scheme was revised and updated in January 2009. The Act requires public authorities to keep their schemes under review and to identify new Classes of Information, giving particular regard to evidence of public interest in the information held and the reasons for business and policy decisions. Information already in the public domain is exempt from requests under the general right of access. Therefore confirming a commitment to release information proactively in the publication scheme will minimise requests and the resources required to handle them.

Whenever new information is released to the public in response to a request, it is important to consider whether it should also be added to the publication scheme, in order to pre-empt similar

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requests in the future. The MOD Publication Scheme is located at: <http://www.FOI.mod.uk>. See Guidance Note **C1 The Publication Scheme**

## Supervision and enforcement by the Information Commissioner

4. In any access to information regime there is scope for disagreement between the applicant and a public authority on the handling of a request. These disagreements may not only be about whether an exemption has been properly applied but also about the handling of the request and the time taken by the authority to comply. In the first instance, such complaints must be reviewed independently by the public authority: within MOD this responsibility rests with the Head of Corporate Information. Thereafter a complainant may appeal to the Information Commissioner, and against the Commissioner's decision to an Information Tribunal.

4.1 The Information Commissioner has powers to issue Information, Decision, Practice or Enforcement Notices. Failure to comply with these may be dealt with as contempt of court. The Commissioner is required to make an annual report to parliament on the Act's operation.

See Guidance Note **A4: Formal powers of the Information Commissioner**.

## Who does the Act apply to?

5. The FOI Act applies, with few exceptions, to all public authorities in England, Wales and Northern Ireland, including government Departments, their agencies and NDPBs, as listed in the Act's schedules. The Scottish Executive introduced its own legislation to cover all of the bodies within the competence of the Scottish Parliament. Defence matters are reserved, so MOD units stationed in Scotland are subject only to the UK FOI Act. However, the same information may be held by both MOD and a Scottish public authority (e.g. environmental monitoring at Faslane). In such cases, you should consult the third party before making a reply.

5.1 Schedule 1 of the FOI Act lists the Armed Forces and the MOD police as separate public authorities. In practise they form part of the organisational structure of the MOD and we act as one public authority under the terms of the Act. Therefore the MOD as a public authority includes the Department, all its agencies and Trading Funds, the Armed Forces, the MOD police and employees of the MOD who are acting as liaison officers. It does not include NDPBs such as the Oil and Pipelines Agency which are listed as authorities in their own right. MOD staff on exchange appointments with other organisations are not regarded as members of the MOD for the duration of that appointment. Where MOD civilians employed on US Visiting Forces (USVF) bases work as part of the US administration, any information they hold in relation to the USVF bases will also be outside the scope of the FOI Act

- Schedule 1 Part 1, (6) lists as covered by the Act "The armed forces of the Crown, *except*
  - a) The special forces, and
  - b) Any unit, or part of a unit which is for the time being required by the Secretary of State to assist the Government Communications Headquarters (GCHQ) in the exercise of its functions."
- Members of the Armed Forces are regarded as including:
  - ◆ Units based abroad in temporary or permanent headquarters
  - ◆ The Gibraltar Regiment
  - ◆ Officials of a government department, wherever situated (UK/abroad), acting in their official capacity
- Special Forces are "those units of the armed forces of the Crown the maintenance of which is the responsibility of the Director of Special Forces or which are for the time being under the operational command of that Director."

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- **Although the Act does not apply to the Special Forces and units of the armed forces required to assist GCHQ, these bodies are subject to the EIRs and DPA.**

5.2 The Secretary of State for Justice has the power to amend the list of bodies subject to the Act, by adding new public authorities or removing those that no longer exist or meet the criteria set out. He also has the power to designate as a public authority any person who is either exercising functions of a public nature or providing, under contract to an authority, any service that is a function of that authority. This means e.g. that a private company which is providing services to the public because an authority has contracted-out that part of its functions could be made directly subject to the FOI Act. An order under s.5 may only be made after consulting the persons to whom the order relates.

## What information does the Act apply to?

6. The Act applies to all of the information held by public authorities in any recorded form. This very wide definition includes paper-based documentation, information stored on computer, audio and video recordings, plans, maps and photographs. The right of access is fully retrospective. There are provisions in the Act relating to historical records and records that have been transferred to external archives bodies, such as the National Archives.

See Guidance Note **D8: Processes "Find the information requested"**.

6.1 Departmental records held in an external archive or registry, such as at the main MOD archive (run by TNT), are considered to be held by the owning TLB. When searching for information in response to a request for information it is the responsibility of the responding desk officer to obtain all the relevant information held by, or on behalf of, the MOD including archived files.

## Exemptions

7. The FOI Act presumes that information should be disclosed. Nevertheless, it recognises that disclosure is not always appropriate and identifies 23 categories of exemption. Careful consideration is needed before applying any exemption: some are absolute; others are qualified and require a public interest test to be applied.

See Guidance Note: **E1 Withholding information**.

7.1 Any refusal to supply information must be justified by the provisions of the FOI Act or EIRs: by citing an applicable exemptions (or exceptions for EIRs); or in one of the following circumstances:

- ✓ The applicant is making a Vexatious or repeated request. See Guidance Note **D6**
- ✓ The cost of complying exceeds the appropriate limit set. See Guidance Note **D9**
- ✓ The applicant has failed to pay a required fee within 3 months. See Guidance Note **D9**
- ✓ You cannot understand the request, in spite of your best efforts to clarify it with the applicant. See Guidance Note: **D3**.

7.2 The FOI Act is **classification blind, so protectively marked information is not automatically exempt from release**. Requests for information must be judged on a case-by-case basis and assessed purely against the FOI Act exemptions. It is important to remember that the protective marking will be an indicator of potential harm associated with disclosure at the time the document was first produced. MOD does not routinely review and downgrade information and documents therefore tend to retain their original marking whether or not it remains valid.

- The protective marking may no longer be current (this will have more relevance to the level of marking than that the information relates to national security)
- The protective marking may relate to matters other than national security (e.g. defence, law enforcement, individual safety or international relations)

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- The protective marking reflects the highest classification of the information contained in a document but only a small part of the content might warrant that classification.

7.3 A formal process for downgrading the protective marking of documents does exist, and this must be followed where protectively marked documents are to be released – [see JSP 440 \(Defence Manual of Security\)](#). JSP 440 also now requires authors to indicate the classification of individual paragraphs in documents to aid the identification of items to consider for possible redaction.

7.4 It should be noted that there is no exemption for embarrassment. Inevitably the disclosure of some information may be embarrassing. It is important to recognise this and to ensure that Ministers, senior staff and the press office are briefed appropriately. However, the Act is intended to increase openness and the exemptions cannot be used to avoid the risk of embarrassment. Remember that the Information Commissioner has powers to ensure that the exemptions are used correctly and not abused.

7.5 In general, these Guidance Notes refer to handling both FOI and EIR requests. Where differences exist (for example the ability to make verbal EIR requests) these are discussed in the relevant Guidance Note. For an understanding of the EIR, and its categories of exceptions See Guidance Notes [B3: EIR 2004](#); [B4: Applying the EIR](#) and [E7: EIR exceptions](#).

## Public Interest Test

8. The Act recognises that disclosure will not always be in the public interest. In order to permit specific information to be kept confidential when appropriate, and where an absolute exemption does not apply, the FOI Act provides a mechanism to weigh the competing public interests for and against disclosure (the public interest test). See Guidance Note [E4: Public Interest Test](#)

**8.1 Great care is also needed in deciding to disclose information. The responsibility for answering requests must therefore be set at an appropriate level. MOD staff must not release information unless they are satisfied that they have the necessary authority to do so.**