

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 February 2013

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

Decision (including any steps ordered)

1. The complainant asked the MOD to provide him with the date and province within Afghanistan, of each weapon launched by the Reaper Unmanned Aerial Vehicle. The MOD refused to provide this information relying on the exemptions contained at sections 26(1)(b) – the defence exemption - and section 27(1)(a) – the international relations exemption - of FOIA. The Commissioner is satisfied that this information is exempt from disclosure on the basis of section 26(1)(b).

Request and response

2. On 5 January 2012 the complainant wrote to the MOD and requested information in the following terms:

'In September 2011 the Royal Air Force announced that the 200th weapon had been launched from a British Reaper unmanned aircraft in Afghanistan. Under the Freedom of Information Act I would like to request the date and province within Afghanistan, of each weapon launch. I would also like to know whether damage assessment had been carried out after each weapon launch.'

3. The MOD responded on 11 January 2012 and confirmed that it did conduct post-strike assessments of every weapons release from Reaper. However, the response explained that the information requested about the dates and province of each launch was exempt from disclosure on the basis of sections 26 and 27 of FOIA.

4. The complainant contacted the MOD on 19 January 2012 in order to ask for an internal review of this decision.
5. The MOD informed the complainant of the outcome of the internal review on 5 March 2012. The review confirmed that the withheld information was exempt from disclosure on the basis of sections 26(1)(b) and 27(1)(a) of FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 23 August 2012 to complain about the way his request for information had been handled. The complainant argued that disclosure of the information he requested, namely the dates and province of each launch, would not result in the prejudicial effects envisaged by the MOD and in any event the public interest favoured disclosure of the information he had requested. The complainant provided the Commissioner with detailed submissions to support his complaint which the Commissioner has referred to in his analysis below. (The Commissioner has confirmed with the complainant that he did not intend his request to cover copies of any actual post-strike assessments, simply confirmation as to whether a post-strike assessment was always carried out after each launch, confirmation which he was of course provided with by the MOD).¹

Reasons for decision

7. Section 26(1)(b) of FOIA states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice...

...(b) the capability, effectiveness or security of any relevant forces'

8. In order for a prejudice based exemption, such as section 26, to be engaged the Commissioner believes that three criteria must be met:

¹ The complainant also complained to the Commissioner about another request submitted to the MOD regarding the use of Unmanned Aerial Vehicles in Afghanistan. The Commissioner findings in relation to that complaint are set out in decision notice FS50461865.

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.

The complainant's position

9. The complainant explained that he had previously submitted a broader request to the MOD which sought details of the circumstances in which Unmanned Aerial Vehicles (UAVs) had launched their weapons in Afghanistan. The MOD had refused to disclose this information citing sections 26(1)(a), 26(1)(b) and 27(1)(a). The Commissioner considered this request in decision notice FS50325462 and concluded that the information was exempt from disclosure on the basis of section 26(1)(b).²
10. The complainant argued that the requested information which was the subject of this complaint was much more limited in scope than the request considered by the Commissioner in case reference FS50325462. The complainant argued that this present request addressed the operational security concerns underlying the MOD's decision to refuse to disclose the information sought by his earlier request.
11. Furthermore, the complainant argued that the MOD had not sufficiently explained how the limited information he had requested would be used to the advantage of enemy forces. More specifically, the complainant raised a number of counter arguments to the position adopted by the MOD. Firstly, the complainant argued that the UAVs are highly mobile and undetectable weapons. There is little parallel therefore to ground

² http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50325462.ashx

assets, knowledge of the location of which may be of assistance to the enemy. Whilst it may be that the exact location, date and time of each UAV weapons launch would be of a level of detail to assist the enemy, a list of weapons releases with location detail restricted to merely that of the province would seem unlikely to provide the level of details that would be of use. Secondly, even if it were to be shown that British strikes were limited to a small number of provinces, such information is unlikely to be of use to the enemy without knowledge of where all other forces' drone strikes are occurring. Thirdly, the enemy is already capable of gathering this information itself from news of strikes within Afghanistan. Fourthly, the complainant emphasised that the earliest of these weapons releases were more than four years old and thus such information was unlikely to be of current use. Fifthly, the complainant also argued that the RAF regularly released information about Reaper weapon launches in Afghanistan without putting the security and effectiveness of the armed forces in danger.³

12. Finally, the complainant also referred the Commissioner to the decision of the Information Tribunal in the case *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner & MoD* [2011] UKUT 153 (AAC).⁴ The complainant noted that the Tribunal, at paragraph 73, had rejected the MOD's submissions that section 26 of FOIA was engaged in relation to the provision of a review of detention practices, a document which the complainant argued was much more likely to be of assistance to the enemy than the limited information that he had requested.

The MOD's position

13. In its internal review response the MOD argued that release of the requested information would give an insight into the circumstances under which Reaper weapon systems are used to engage enemy forces with lethal force, and the limitations placed on that force. The MOD argued that this would allow assessments to be made about where and how they might be deployed in future operations. Releasing the location and date of weapons launches would indicate where the weight of UK

³ The complainant referenced the following two sources as examples of such disclosures:
RAF Operational Update 11-17 July 2011:
<http://www.raf.mod.uk/rafoperationalupdate/opsupdate/opsupdate17jul2011.cfm>

RAF Operational Update 19-25 February 2012:
<http://www.raf.mod.uk/rafoperationalupdate/opsupdate/opsupdate25feb2012.cfm>

⁴ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i571/appger-v-ic-judgment.pdf>

UAV assets are focussed in Afghanistan, and potentially the type of activity conducted. Enemy forces may use this information to vary their techniques, tactics and procedures in order to effectively attack UK forces.

14. In its internal review the MOD also argued that the information disclosed by the RAF differed in a number of ways from the information requested by the complainant. Firstly, the disclosed information referred only to 'strikes' rather than specific weapons launches. Secondly, the information released described the nature of operations carried out over the course of a week; specific dates of strikes are not published and nor does the published information specify a particular region in which a weapon launch was carried out.
15. As part of his investigation of this complaint, the Commissioner asked the MOD to provide him with a clear and detailed explanation which sets out why disclosure of the withheld information would be of use to the enemy. The Commissioner also asked the MOD to specifically address each of the complainant's various counter arguments as summarised above. The MOD provided the Commissioner with detailed information to address these inquires. However, given the detailed and sensitive nature of these submissions, the Commissioner cannot refer to the MOD's arguments in any detail in this notice. In other words, disclosure of the MOD's detailed rationale for why the requested information is exempt from disclosure under FOIA, is itself also, in the MOD's opinion, likely to result in the prejudicial consequences section 26(1)(b) is designed to protect.

The Commissioner's position

16. With regard to the first criterion of the test set out at paragraph 8, the Commissioner accepts that the type of harm that the MOD believes would be likely to occur if the information was disclosed is applicable to section 26(1)(b).
17. With regard to the second criterion, having considered the detailed explanation provided to him by the MOD the Commissioner is satisfied that disclosure of this information clearly has the potential to harm the capability and effectiveness of British forces in Afghanistan. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which section 26(1)(b) is designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the MOD believes would be likely to occur is one that can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the

third criterion, disclosure could result in prejudice to the capability, effectiveness or security of British armed forces.

18. In relation to the third criterion, the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Tribunal decisions. He believes that for the lower level of likelihood, i.e. 'likely', to be met the chance of prejudice occurring should be more than a hypothetical possibility; there must have been a real and significant risk. With regard to the alternative limb of 'would prejudice' the Commissioner believes that this places a stronger evidential burden on the public authority to discharge. The MOD did not specify which level of prejudice it was seeking to rely on and therefore the Commissioner has considered whether the lower threshold, of would be likely, is met.
19. The Commissioner has taken into account the complainant's argument that disclosure of the requested information would not represent a real and significant risk to the interests which section 26(1)(b) is designed to protect. In particular, the Commissioner has paid particular attention to the various counter arguments the complainant has advanced. However, having had the benefit of being able to discuss the circumstances of this request candidly with the MOD, the Commissioner is satisfied that disclosure of the requested information would represent a real and significant risk to the effectiveness and capability of British forces in Afghanistan and therefore the exemption contained at section 26(1)(b) is engaged.
20. In particular, and in relation to the complainant's first counter argument, the Commissioner is satisfied that the MOD has demonstrated how information simply limited to the province and date would still be useful to the enemy in varying their techniques, tactics and procedures in order to more effectively attack UK forces. The Commissioner is also satisfied, based upon the MOD's submissions, that the fact that some of the data is 'old' and indeed only relates to British forces does not undermine this conclusion.
21. The Commissioner has some sympathy with the complainant's argument regarding the proactive publication of UAVs strike information by the RAF. However, having reviewed the information that has been disclosed the Commissioner ultimately agrees with the MOD that there are notable differences between the information that has previously been disclosed and the nature of the information which is the focus of this request. In the Commissioner's opinion the disclosures by the RAF are infrequent and furthermore do not provide a consistent level of detail and thus an accurate parallel cannot be drawn between such disclosures and the requested information. Furthermore, the Commissioner is not persuaded that based simply upon media reports and knowledge of attacks within

Afghanistan, the enemy could develop a level of information parallel to that which is the subject of this request.

22. Finally, whilst the Commissioner acknowledges that the Tribunal rejected the MOD's application of section 26 in the manner identified by the complainant in the *APPGER* case referenced above, he does not believe that any useful parallel can be drawn between that case and this present one. In the Commissioner's view each request must be considered on its own merits and for the reasons explained above, and indeed for the reasons the Commissioner has not been able to include in this notice, he is satisfied that the requested information is exempt from disclosure on the basis of section 26(1)(b) of FOIA.
23. The Commissioner fully recognises that the level of detail (or lack of detail) included in this notice which explains why he has reached this conclusion may well be frustrating to the complainant. However, he wishes to reassure him that his submissions have been given full and complete consideration by the Commissioner.

Public interest test

24. Section 26 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 26(1)(b) outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

25. The MOD argued that there was a compelling public interest in ensuring that the security and effectiveness of British armed forces on current operations was not compromised by disclosing information that would allow the enemy to improve their techniques, tactics and procedures in a way that would be likely to prejudice the effectiveness of UAVs.

Public interest arguments in favour of disclosing the information

26. The complainant argued that there was a real and genuine public interest in gaining some understanding of how these new weapons systems are being used in order to better understand the potential dangers of the continued development and use of unmanned systems. The complainant argued that the public's concern, and public debate, surrounding these weapons systems had significantly intensified since the Commissioner has issued his decision notice on case reference FS50325462. The complainant explained that this concern centred around whether by removing the risk to one's own forces, these remote unmanned systems may make undertaking war much easier, and within specific armed conflicts, may lower the threshold when it comes to launching weapons.

27. The complainant noted that the MOD itself acknowledged these concerns in its publication *The UK Approach to Unmanned Aircraft Systems* with one passage of this publication stating 'It is essential that, before unmanned systems become ubiquitous (if it is not already too late) that we consider this issue and ensure that, by removing some of the horror, or at least keeping it at a distance, that we do not risk losing our controlling humanity and make war more likely... What is needed is a clear understanding of the issues involved so that informed decisions can be made'⁵. The complainant argued that this clear understanding could only be aided by information about how UAVs are being used in Afghanistan.
28. The complainant also argued that as this request sought limited information in comparison to the one considered in FS50325462, the public interest in releasing this information was not outweighed by the public interest in withholding the information.

Balance of the public interest

29. The Commissioner recognises that the activities of the armed forces in Afghanistan are the subject of very significant and legitimate public interest. That is particularly true in relation to the use of UAVs. The Commissioner acknowledges the complainant's line of argument that the use of these weapons is controversial, and furthermore that concerns around the use of such weapons have arguably increased since the complainant submitted his request in the previous case. The Commissioner believes that disclosure of the requested information could go a significant way to informing this debate given that it would provide a clear insight into how UAVs had been used by British forces since 2008, i.e. it would reveal the provinces in which they were used and the specific dates of any weapon launch. In light of the public interest in the use of UAVs by British forces in Afghanistan the Commissioner believes that the public interest arguments for disclosing the information need to be given significant weight.
30. However, for the reasons discussed above and based upon his discussions with the MOD, the Commissioner has concluded that the disclosure of the requested information represents a significant and real risk of harm to the capability, effectiveness and security of British forces

⁵ The UK Approach to Unmanned Aircraft Systems, Joint Doctrine Note 2/11, DCDC, Ministry of Defence, April 2011, para 517. <http://www.mod.uk/DefenceInternet/MicroSite/DCDC/OurPublications/JDNP/Jdn211TheUkApproachToUnmannedAircraftSystems.htm>

in Afghanistan. (This is despite the fact that the Commissioner acknowledges that the information which is the focus of this request is limited in nature when compared to the broader request considered in FS50325462.) In the Commissioner's opinion there is an exceptionally weighty, and overriding, public interest in ensuring the security and safety of British forces currently deployed in Afghanistan. Therefore despite the significant weight that the Commissioner accepts should be given to the public interest in disclosure of the information which is the focus of this request, he has reached the conclusion that the public interest firmly favours maintaining the exemption.

31. In light of the Commissioner's findings in relation to section 26(1)(b) he has not gone on to consider the MOD's reliance on section 27(1)(a) of FOIA.

Right of appeal

32. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
Deputy Commissioner
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