

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 January 2021

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 information about the use of Reaper and Typhoon aircraft in Operation Shader and for the number of sorties, and location of them, that RAF Reaper aircraft had flown outside of Operation Shader. The MOD provided the complainant with information regarding Reaper and Typhoon activities as part of Operation Shader. However, it withheld the information concerning the use of RAF Reaper aircraft outside of Operation Shader on the basis of sections 26(1)(b) (defence) and 27(1)(a) and (c) (international relations) of FOIA.
2. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 26(1)(b) of FOIA and that in all of the circumstances of the case the public interest favours maintaining the exemption.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the MOD on 2 January 2020:

'1) For each month between October 2019 and December 2019, and broken down between i) Reaper and ii) Typhoon a) the total number of missions undertaken by these aircraft on Operation Shader; b) the number of those missions entering Syria; c) the number of those missions entering Iraq?

2) For each month between October 2019 and December 2019, the number of sorties with weapons released by a) Reaper and b) Typhoon and broken down between Iraq and Syria?

3) For each month between October 2019 and December 2019, the number and type of weapons released by a) Reapers, and b) Typhoon, broken down between Iraq and Syria?

4) The number of UK weapon release events in a) Iraq and b) Syria per month from October 2019 to December 2019, broken down between Reaper and Typhoon?

5) Please can you tell me, for each month between October 2019 and December 2019, how many hours have UK a) Reaper and b) Typhoon flown on Operation Shader?

*6) Please can you detail how many sorties have RAF Reaper aircraft flown outside of Operation Shader during 2019 and, if any, where these sorties occurred?'*¹

5. The MOD contacted the complainant on 30 January 2020 and confirmed that it held information falling within the scope of the request but it considered it to be exempt from disclosure on the basis of section 26 (defence) of FOIA and needed additional time to consider the balance of the public interest test. The MOD contacted the complainant again on 7 February 2020 and further extended the time it needed to consider the public interest test.

¹ Operation Shader is the name given to the UK's role in military intervention against Islamic State in Iraq and Syria. A 'Reaper' is an unmanned, remotely piloted aircraft.

6. The MOD provided the complainant with a substantive response on 17 February 2020. It disclosed the information sought by questions 1 to 5. However, the MOD explained that the information sought by question 6 was exempt from disclosure on the basis of sections 26 and 27 (international relations) of FOIA and that in all the circumstances of the case the public interest favoured withholding the information.
7. The complainant contacted the MOD on 18 February 2020 and asked it to conduct an internal review of this refusal.
8. The MOD informed him of the outcome of the review on 15 April 2020. The MOD confirmed that the information sought by question 6 was exempt from disclosure on the basis of sections 26(1)(b) and 27(1)(a) and (c) of FOIA and that the public interest favoured withholding the information.

Scope of the case

9. The complainant contacted the Commissioner on 27 April 2020 in order to complain about the MOD's refusal to provide him with the information falling within the scope of question 6 of his request. He argued, for reasons that are set out below, that there was a compelling public interest in the disclosure of this information.

Reasons for decision

Section 26 - defence

10. Section 26(1)(b) 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.'*

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

- 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 MOD's position

12. The MOD argued that the withheld information would provide an adversary with the information required to make a detailed assessment of the effectiveness of UK tactics and operational capabilities which would increase the security threat to UK personnel. It was on this basis that it considered the withheld information to be exempt from disclosure by virtue of section 26(1)(b) of FOIA. The MOD explained that in its view the level of prejudice for the exemption was engaged at the higher level of 'would' prejudice rather than the lower level of 'would be likely to'.
13. The MOD provided the Commissioner with more detailed information to support the application of this exemption. However, these submissions refer to information which is itself sensitive and therefore such submissions cannot be replicated in this decision notice.

The Commissioner's position

14. With regard to the first criterion of the test set out above, the Commissioner accepts that the type of harm that the MOD believes would occur if the information was disclosed is applicable to the interests protected by section 26(1)(b) of FOIA.
15. Having considered the submissions provided to her by the MOD, the Commissioner is satisfied that disclosure of this information clearly has the potential to harm the capability and effectiveness of UK forces. 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 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.
16. In relation to the third criterion, the Commissioner is satisfied that the likelihood of prejudice occurring if the withheld information was disclosed is clearly one that is more than hypothetical. Rather, taking into account the arguments set out in the MOD's submissions to the Commissioner, she is satisfied there is a real and significant risk of this prejudice occurring as the information would assist adversaries in

making a detailed assessment of the effectiveness of UK tactics and operational capabilities, which in turn would risk the security of UK personnel. She also agrees with the MOD that the higher threshold of 'would' prejudice is met.

17. The Commissioner has therefore concluded that section 26(1)(b) is engaged in respect of all of the withheld information.

Public interest test

18. 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 in disclosure of the withheld information

19. The complainant argued that the MOD had underestimated the public interest in disclosing the withheld information.
20. In support of this position, he argued that there is a great deal of public controversy around the use of these systems, particularly the way they can be used secretly and without oversight.
21. He noted that there had been no public announcement that the RAF was using Reaper outside of Operation Shader. He suggested that the sorties that UK Reapers are currently undertaking outside of Operation Shader may well be uncontroversial – perhaps training or test flights. However, he suggested they may also be highly controversial, being undertaken in areas of armed conflict.
22. He argued that such a hidden intervention would be very controversial and that there was a significant public interest in some information being released about these sorties. The complainant suggested that many would argue that it is in the public interest that MPs and the public should be informed where these sorties are taking place, particularly due to the association of these systems with targeted killing operations and the argument that drones such as Reaper are lowering the threshold for the use of armed force. The complainant argued that there is a great deal of public interest in appropriate and proper transparency over the deployment of UK armed forces and military equipment and in the circumstances of this case the public interest favoured disclosure of the withheld information.

Public interest in maintaining the exemption

23. The MOD's internal review argued that the public interest in the release of the withheld information was strongly outweighed by the public interest in maintaining the exemption because of the risk to the lives of sensitive and protected individuals that could arise from disclosure. The MOD's submissions to the Commissioner elaborated on these arguments.

Balance of the public interest arguments

24. The Commissioner agrees with the complainant that there is a significant public interest in the disclosure of information about the use of Reaper aircraft. Furthermore, she accepts that there is a particular interest in the disclosure of the withheld information in order to ensure a greater level of transparency about how such technology is being used outside of Operation Shader. In light of this the Commissioner considers there to be a significant and weighty public interest in disclosure of the withheld information.
25. However, the Commissioner is also conscious that disclosure of the information risks undermining the capability and effectiveness, and ultimately the safety of, British armed forces. Such an outcome is clearly against the public interest. Furthermore, in the circumstances of this case the Commissioner is conscious that disclosure of the information would, rather than simply being likely to, result in prejudice which in her view adds further weight to the public interest in maintaining the exemption. Consequently, despite the significant weight that the Commissioner accepts should be given to the public interest arguments in favour of disclosing the withheld information, she has reached the conclusion that the public interest favours maintaining the exemption.
26. In light of this decision the Commissioner has not considered the MOD's reliance on sections 27(1)(a) and (b) of FOIA.

Right of appeal

27. 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: 0870 739 5836

Email: grc@justice.gov.uk

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

28. 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.
29. 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

Jonathan Slee
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