

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **23 February 2024**

Public Authority: **Ministry of Defence**

Address: **Whitehall**
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant has requested information about the United Kingdom's armed forces operations in the Black Sea and Ukraine.
2. The Commissioner's decision is that the Ministry of Defence was entitled to rely on section 26 (Defence) of FOIA to withhold the military information requested in parts one and three of the request for information from the complainant.
3. The Commissioner also decided that, on the balance of probabilities, the Ministry of Defence does not hold the financial information within scope of parts two, three, four and five of the request .
4. The Commissioner does not require any steps as a result of this decision notice.

Request and response

5. On 23 October 2022, the complainant wrote to the Ministry of Defence ("MOD") and requested information by saying as follows:

"1. The dates and duration of the flights over the Black Sea area and along the Moldovan and Ukrainian borders carried out by the RAF, Navy or Army, covering the period, 1st January 2019 to 22nd October 2022.

2. The cost of such flights to include fuel, maintenance and crewing costs.

3. The dates and duration of British Naval patrols in the Black Sea, the associated costs, of fuel, maintenance and crewing. Such information to cover the above dates.

4. The cost of deployment of any British land forces within the borders of Ukraine during the above period.

5. The cost to the U.K. taxpayer of any armaments donated to the Ukrainian Government, armed forces and mercenaries during the specified period.

As the information requested is historical and not of strategic interest to any enemy foreign or domestic, I do not see any reason to withhold full disclosure."

6. The MOD substantively responded on 6 February 2023.

7. Regarding parts 1 and 3, it stated that,

"Section 24 and 26 exemptions have been applied to the information requested on the dates and durations of flights undertaken by the UK armed forces over the Black Sea area and along the Moldovan and Ukrainian borders.

8. It then explained that sections 24 and 26 were qualified exemptions and subject to a public interest test (PIT), which means that the information requested can only be withheld if the public interest in doing so outweighs the public interest in its disclosure.

9. The decision to withhold this information was based on the result of these PITs, which found that a release would compromise the security and diminish the effectiveness of future UK operations and have a detrimental impact on UK defence and national security. If released, the information exempted under sections 24 & 26 of the FOIA could provide insights into the UK's capabilities, intent and activities which could increase the vulnerability of UK Armed Forces. It could also undermine Ukrainian operations and the UK-Ukrainian relationship.

10. Regarding part 2 of the request, the MOD stated that it did not maintain a breakdown of costings associated with flights on an individual basis, and therefore this information is not held. The Royal Air Force captured an annual operating cost for squadrons, which can include any activity from training, exercises to operations across multiple geographical locations.
11. Regarding part 3 of the request, the MOD provided an estimated cost of all Navy operational activity in the Black Sea during the period 1 January 2019 to 22 October 2022.
12. Regarding part 4 of the request, it provided an estimated cost of all Navy operational activity in the Black Sea during the period 1 January 2019 to 22 October 2022. This figure includes workforce, estimates for consumables and fuel. However, it excludes equipment support and maintenance contract costs because the MOD does not allocate or record maintenance costs on the basis of particular operations, therefore this information is not held.
13. Regarding part 5 of the request, the MOD stated that the UK has not gifted any munitions to any Ukrainian mercenary groups. The cost of munitions gifted to Ukraine is also exempted under Section 27 and that the public interest test favoured maintaining the exemption.
14. Following an internal review the MOD wrote to the complainant on 22 June 2023. It stated that the exemptions at sections 24(1) (National Security), 26(1)(b) (Defence) were correctly applied to withhold some of the information in scope of the request and that section 27(1)(a) (International Relations) was not engaged as regards part 5 of the request and the complainant should have been advised that information in scope of part 5 of his request was not held.

Scope of the case

15. The complainant contacted the Commissioner 30 December 2022 to complain about the way his request for information was being handled.
16. The Commissioner considers he has to determine whether the MOD held requested information where it says it did not. He also has to determine its reliance on the stated exemptions to withhold requested information was correct.

Reasons for decision

Section 1 of FOIA – general right of access

17. Section 1 of FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to them if it is not exempt information.
18. The MOD maintains it does not hold the financial information requested in parts 2, 3 and 4 of the request.
19. Additionally, an outcome of the internal review was that the MOD informed the complainant that the cost to the taxpayer (information in scope of part 5 of the request) was not held at the time of the request.
20. In cases where a dispute arises over the recorded information held by a public authority at the time of a request, the Commissioner, following the outcome of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. This means that the Commissioner will determine whether it is likely, or unlikely, that the public authority held information relevant to the complainant's request at the time that the request was received.
21. In order to make his determination, the Commissioner asked the public authority to explain the searches it had undertaken to locate any information that would fall within the scope of this request and to explain why these searches would have been likely to locate all of the information in scope.

MOD Submissions

22. The MOD does not maintain breakdown of costings associated with flights on an individual basis, and therefore this information is not held. The Royal Air Force captures an annual operating cost for squadrons, which can include any activity from training, exercises to operations across multiple geographical locations.
23. It explained that a rough estimate was formulated as a result of the request, however, this was not recorded at the time of receipt and is not an official figure. The cost to the UK taxpayer does not only equate to the value of munitions that have been procured from defence suppliers and donated from UK stockpiles, but it also contains other factors, such as the cost of replenishing those donated munitions. The cost will only

be known when the replenishment of munitions that have been donated is complete which, owing to contracting and delivery timelines, will not be complete in the current financial year (FY). Even if this information were available, calculating the cost of munitions donated in the period specified, which does not align to an FY, would be complex and require significant resource. Although the Act is designed to give individuals a greater right of access to official recorded information with the intention of making public authorities more transparent and accountable, the Act does not require public authorities to create new information in order to respond to a request for information. In summary, while information is held relating to the specific munitions that were donated, and the value of those munitions, the specific information the complainant requested (the full cost to the taxpayer) is not held by the MOD.

24. Searches for information in scope of these elements of the request were made via the Army, RAF, Navy and finance secretariats who liaised with subject matter experts to determine what, if any information was held. The RAF and Navy both conduct flights in and around the area, so it was relevant to conduct a search of their records to determine what information is held with regards to the costs of flights. The Army Secretariat contacted the Joint Helicopter Command, however they quickly determined that they do not operate in this area, so no information would be held by them. The finance secretariat was approached as the most relevant area of the MOD to hold information relating to the costs of armament donations, were they to be held.
25. The costs of these sorties are covered within the Air Command and the Royal Navy's Annual Budget total and there were therefore no additional costs to Defence. Consequently, the costs of these flights have not been separately captured. Fuel usage and costs are not recorded on a per hour or per flight basis. Actual fuel usage is dependent upon a wide range of variables including aircraft weight, sortie type and length, weather and power use. Fuel costs also vary greatly dependent on the source of the fuel and more than one method of fuelling can be used for any given flight hour. For example, baseline fuels costs will vastly differ between MOD bulk fuel contracts, or commercial rates with fuel suppliers when visiting non-MOD aerodromes or receiving Air-to-Air Refuelling support from RAF tanker aircraft and those of Partner Nations. Similarly, maintenance and crew costs are not captured, as MOD personnel do not work on a flat rate cost per hour basis and it is therefore not possible to easily calculate this information per flight.
26. No armaments have been donated to Ukrainian mercenaries; therefore this information would not be held.

27. Although the Act is designed to give individuals a greater right of access to official recorded information with the intention of making public authorities more transparent and accountable, the Act does not require public authorities to create new information in order to respond to a request for information.
28. The Commissioner is satisfied that the MOD carried out targeted and appropriate searches which would have been likely to locate the financial information requested in parts two, three, four and five of the request.
29. The Commissioner is satisfied on the balance of probabilities that the MOD does not hold the particular and specific financial information sought over the specified period of time i.e. 1 January 2019 to 22 October 2022. The Commissioner cannot compel the MOD to provide an estimate of the financial information sought. There being no requirement for further information to be created to respond to a request for information. The Commissioner is therefore satisfied that the MOD has complied with the requirements of section 1 of FOIA.

Section 26

30. The Commissioner has viewed and considered a copy of the withheld information. This being the military information requested in parts one and three of the request.
31. Section 26 of FOIA allows a public authority to withhold information whose disclosure would affect the capability, effectiveness or security of any of the UK's armed forces or any forces co-operating with those forces. The MOD relies on this exemption to withhold the requested military information in parts one and three of the complainant's request.
32. In the Commissioner's opinion, three criteria must be met in order to engage a prejudice based exemption:
 - first, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information were 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.

MOD's Submissions

33. To disclose the information could provide adversaries with useful intelligence on the MODs tactics, techniques and procedures. This could potentially place our adversaries in a better position to counter UK defence capabilities, diminishing their effectiveness and increasing the vulnerability of UK armed forces involved. Disclosing this information would compromise ongoing military operations and adversely affect the security or physical safety of UK forces and any forces cooperating with UK forces, by putting them at risk, and affecting their ability to carry out their duties.

Commissioner's Reasonings

34. The Commissioner has viewed copies of the information being withheld by reference to section 26. Having done so, he is satisfied that the entirety of that military information (i.e. as requested in parts one and three of the request) engages section 26 of FOIA for the reasons given by the MOD. He therefore next considered the public interest test as required by section 2 of FOIA.

MOD Submissions

35. The MOD relied on the given reasons for engaging the exemption to highlight the reasons for its maintenance .
36. The Mod considered that disclosure of the information requested would provide insight into the United Kingdom's support to Ukraine which is a topic that attracts significant public and media interest. Releasing this information could provide an overview of the MOD's continued support to Ukraine, and also an understanding of the costs associated to its commitment as well as the public's understanding of the United Kingdom's capabilities and assets, particularly in the area specified in the request.

Balance of the public interest

37. The Commissioner recognises that there is a very strong public interest in preserving the capability, effectiveness and security of the UK's armed forces. He is satisfied in this case that not only would disclosure be more likely than not to undermine that capability, effectiveness or security, but that the harm that would arise from such an effect, if it did

occur, would be substantial. This easily outweighs any general public interest in transparency and accountability.

38. The Commissioner is also mindful that the MOD has demonstrated that disclosure of the information would, rather than simply being likely to result in prejudice. In the Commissioner's opinion this adds further weight to the public interest in maintaining the exemption.
39. For the reasons set out above the Commissioner finds that the public interest in maintaining the exemption at section 26(1)(b) outweighs, by a clear margin, the public interest in disclosure. Therefore the MOD was entitled to rely on this exemption to withhold the requested military information.
40. The Commissioner being satisfied that section 26 applied to all of the withheld information, it is not necessary for him to go on to consider the applicability of section 24 to the same information.

Right of appeal

41. 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

42. 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.
43. 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

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