

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 January 2015

Public Authority: Ministry of Defence

Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted three requests to the Ministry of Defence (MOD) concerning weapons launches from unmanned aerial vehicles (UAVs). After some delay, the MOD provided the complainant with the information falling within the scope of requests 1 and 2. It sought to withhold the information falling within the scope of request 3 on the basis of sections 27(1)(a) and (c) (international relations) of FOIA.
2. The Commissioner's decision is that the information falling within the scope of request 3 is exempt from disclosure on the basis of section 27(1)(a) of FOIA. However, he has also concluded that the MOD breached sections 10 and 17 of FOIA in handling these requests.

Request and response

3. The complainant submitted the following requests to the MOD on 30 April 2013:
 1. *The number of weapons launched from Reaper UAVs up until 30 April 2013. I would be grateful if you could provide the information:*
 - a) *Broken down into types of weapons launched (ie Hellfire and GBU-12) as you have done previously.*
 - b) *Broken down by month rather than just by year*

2. Have any of the Reaper UAVs controlled from RAF Waddington launched weapons up until April 30th. If so please can you provide details.

3. On 24th April in the House of Commons Mr Robathan corrected an earlier reply he had given in a written answer and stated that UK personnel embedded with the US Air Force had flown 2,150 operational missions using US Reaper and Predator RPAS in support of operations in Afghanistan, Libya and Iraq. Can you tell me how many weapons were launched during these operations broken down into country.

4. The MOD acknowledged receipt of this request on 14 May 2013. Over the following months the MOD contacted the complainant on a number of occasions, often prompted by an email sent by him, in order to explain that it was proving to be a complex task to collate information from the disparate data sources and consequently there would be a delay before it was in a position to issues its response.
5. The MOD provided the complainant with a substantive response to his requests on 4 February 2014. The MOD provided him with the information sought by requests 1 and 2. The MOD explained that it was withholding the information sought by request 3 regarding Afghanistan and Libya on the basis of sections 27(1)(a) and (c) of FOIA. However, it confirmed that it did not hold any information about operations in Iraq.
6. The complainant contacted the MOD on 12 February 2014 and asked the MOD to conduct an internal review of its handling of his requests. He specifically asked the MOD to consider the following: Firstly, he was dissatisfied with the fact that it took the MOD over nine months to provide him with a substantive response to these requests. Secondly, he queried the accuracy of some of the figures provided in response to request 1. Thirdly, he questioned the MOD's view that the information sought by request 3 was exempt from disclosure on basis of section 27. He also queried whether it was possible to disclose, in the alternative, a breakdown of the 2150 operational missions by country only as opposed a breakdown by country and weapon.
7. The MOD provided him with a revised version of the data falling within the scope of request 1 on 13 February 2014.
8. However, the MOD did not inform him of the outcome of the internal review until 12 August 2014. The review concluded that the delay in providing a substantive response to the requests constituted breaches of sections 10 and 17 of FOIA. However, the MOD explained that such delays were due to the time it took to collate data from disparate sources in order to answer requests 1 and 2, and the delays in seeking

an opinion from the US over the release of the information sought by request 3. The MOD explained that there was no requirement to answer requests in a piecemeal fashion and by not doing so it considered it a more efficient way to handle requests and any subsequent reviews and appeals. The review also concluded that sections 27(1)(a) and (c) had been correctly relied upon to withhold the information falling within the scope of request 3.

Scope of the case

9. The complainant contacted the Commissioner on 17 September 2014 in order to complain about the MOD's handling of his requests. He raised the following points of complaint:
10. He explained that he was dissatisfied with the MOD's delay in handling his requests, both in terms of the time taken to issue its substantive response and the time taken to issue its internal review. He also disputed the MOD's position that information sought by request 3 was exempt from disclosure on the basis of section 27(1)(a) and (c), and even if it was, he argued that the public interest favoured disclosure of this information.
11. FOIA does not include a statutory timeframe within which internal reviews must be completed. Therefore the Commissioner has considered the MOD's delays in completing the internal review in the Other Matters section at the end of this notice. However, this notice does consider the MOD's delays in responding to the request.
12. In relation to request 3, the Commissioner notes that in his request for an internal review the complainant queried whether it was possible to disclose, in the alternative, a breakdown of the 2150 operational missions by country only as opposed to a breakdown by country and weapon.
13. In the Commissioner's view request 3 actually only seeks a breakdown of weapons releases by country given that it states: *'Can you tell me how many weapons were launched during these operations broken down into country.'*
14. Therefore the Commissioner has considered only whether a breakdown of weapons launches by country is exempt from disclosure on the basis of the exemptions cited by the MOD.

Reasons for decision

Section 27 – international relations

15. Section 27(1)(a) provides that information is exempt if its disclosure would, or would be likely to, prejudice relations between the UK and any other State.

The MOD's position

16. The MOD has argued that disclosure of the information falling within the scope of request 3 would be likely to prejudice its relations with the United States (US). The MOD explained that it had approached the US in order to seek its views over the disclosure of this information. At the time this decision notice is being issued, the MOD had not received a definitive view from the US over the release of this specific information. However, the MOD argued that based on previous conversations with the US over similar information, it was aware of US disquiet over the disclosure of such information. In such circumstances the MOD judged that disclosure of the withheld information, without receiving the definitive views of the US, would be likely to prejudice the UK's relations with the US.

The complainant's position

17. The complainant argued that the MOD had failed to make the case for section 27 being engaged because it had failed to show how disclosure of the specific information requested would cause the prejudice outlined in the exemption. He noted that the MOD is happy to release the same level of information about the use of UAV's by British forces utilising UK Reaper drones. Furthermore, he argued that even if disclosure of the information would cause 'disquiet' to the US, the MOD must still demonstrate that this would not fall into such a category of disagreement that would arise in the ordinary course of relations but would cause actual or real prejudice to relations. Finally, the complainant suggested that it was not actually clear from the content of the internal review whether an opinion on the disclosure of this information was actually sought from the US, and if it was, whether this was sought in a neutral and unbiased way.

The Commissioner's position

18. In order for a prejudice based exemption, such as section 27(1)(a), 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; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
19. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance *‘if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary’*.¹
20. With regard to the first criterion of the three limb test described above, the Commissioner accepts that potential prejudice to the UK’s relations with the US clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect.
21. With regard to the second criterion, in light of the lack of a clear indication from US that it would be content with the disclosure of this information, and US disquiet over the disclosure of similar information in the past, the Commissioner is satisfied that disclosure of this information has the potential to harm the UK’s relations with the US. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which section 27(1)(a) is designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the MOD

¹ [*Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)*](#), paragraph 81.

believes would 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 making relations more difficult and/or demand a particular damage limitation exercise.

22. With regard to the third criterion, based simply on the outcome of the internal review the Commissioner can understand why the complainant would doubt whether disclosure of the withheld information would actually be likely to harm the UK's relations with the US. However, the Commissioner has had the benefit of examining the MOD's exchanges with the US about the disclosure of similar information in the past as well as its exchanges with the US about this particular request. The Commissioner recognises that there is a lack of clarity about the US' position given that its final view on the disclosure of the withheld information has not been provided. However, the Commissioner is satisfied that based upon the exchange of correspondence the likelihood of harm occurring is clearly more than a hypothetical possibility. In the Commissioner's opinion there would be a real and significant risk of prejudice if the withheld information were to be disclosed.

Public interest test

23. Section 27 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosure of the information

24. The MOD acknowledged that disclosure of the information could increase the public's understanding of international co-operation and operational issues of military missions which UK forces took part in.
25. More specifically it acknowledged that there was some public interest in disclosing information about UK personnel embedded with the US Air Force operating US Reaper and Predator UAVs in Afghanistan and Libya. For example, it would provide some limited additional understanding of the UK's operations with the US in relation to these operations, and the use of UAVs beyond that which is already in the public domain.
26. The complainant argued that there was a compelling public interest in disclosure of the withheld information. He argued that this was demonstrated not least by the fact that until he submitted this FOI request, it was not publicly known that UK forces were using US, as well as British UAVs in Afghanistan to fly missions and launch airstrikes. He further argued that the use of UAVs to launch airstrikes is highly

controversial both within the UK and internationally. He suggested that the fact that pilots from one nation are operating drones belonging to a second nation on military operations inside a third country is a matter of great public interest.

27. The complainant noted that in the internal review response the MOD had referenced the response to a Parliamentary Question (PQ) on 21 November 2012:

'Rehman Chishti: To ask the Secretary of State for Defence on how many occasions UK personnel flew armed remotely-piloted air system missions during Operation Ellamy. [124378]

*Dr Murrison: During Operation Ellamy last year, UK personnel embedded with United States forces contributed to around 200 armed remotely piloted air system missions as part of the NATO mission in support of United Nations Security Council Resolution 1973.'*²

28. The complainant suggested that although this information appears helpful, Dr Murrison did not in fact answer the question, rather he simply noted that the UK had '*contributed to* around 200 armed remotely piloted air system missions' (the complainant's emphasis). Furthermore the complainant explained that based on information published by NATO in January 2012 it has been publicly confirmed that a total of 250 armed UAV flights were conducted during the campaign.³ He argued that it was beyond credulity that UK personnel flew 80% of those missions.

Public interest in favour of maintaining the exemption

29. The MOD emphasised that the effective conduct of international relations depends on maintaining trust and confidence between States. It argued that releasing this information would undermine the relationship of trust between the UK and US. It argued that there was a very strong public interest in maintaining good working relationships for the benefit of mutual defence, especially in respect of existing bi-lateral co-operation.

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<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121121/text/121121w0001.htm>

³ http://www.nato.int/nato_static/assets/pdf/pdf_2012_05/20120514_120514-NATO_1st_ICIL_response.pdf

Balance of the public interest

30. The Commissioner recognises that the activities of the UK personnel embedded with the USAF operating US Reaper and Predator UAVs in Afghanistan and Libya are matters of significant public interest given the broader debate regarding the use of such technology. Given the relatively limited nature of the information requested, in the Commissioner's opinion the degree to which disclosure of the information would further this debate is somewhat limited.
31. It is worth noting, in the circumstances of this case, that the public interest test does not simply require the public interest in disclosure to be weighed against that in non-disclosure. The public interest to be balanced with that in disclosure in this case is the public interest in avoiding prejudice to international relations, specifically UK/US relations. For the reasons outlined above the Commissioner is satisfied that disclosure of the withheld information represents a significant and real risk to the UK's relations with the US. In the Commissioner's opinion there is a very weighty – and ultimately compelling – public interest in the UK maintaining strong relations with the US not least in order to ensure effective co-operation on military operations such as those which are the focus of this request. Consequently, despite the notable weight which he accepts should be attributed to the public interest arguments in favour of disclosing the withheld information, the Commissioner has concluded that the public interest favours maintaining the exemption.
32. Given his findings in relation to the MOD's application of section 27(1)(a), the Commissioner has not gone on to consider its reliance on 27(1)(c).

Delays in handling the requests

33. As the MOD acknowledged in its internal review response, its delays in providing the complainant with the information falling within the scope of requests 1 and 2 constituted a breach of section 10(1) of FOIA. Furthermore, as also acknowledged in the internal review, the MOD's delays in confirming that it was seeking to withhold the information falling within the scope of request 3 constituted a breach of section 17(1).
34. The Commissioner has commented on these delays further in the Other Matters section of this notice.

Other matters

35. As noted above the Commissioner has concluded that the MOD breached sections 10(1) and 17(1) by failing to issue timely responses to the complainant's three requests. It took the MOD 195 working days to provide the complainant with a substantive response to his three requests, a period of time which, even taking into account the complexities of the compiling the responses, the Commissioner considers to be grossly excessive.
36. The Commissioner notes the complainant's suggestion that the MOD should have provided the information sought by requests 1 and 2 once this had been collated rather than delaying providing this information based upon the continuing discussions with the US about the information falling within the scope of request 3. The Commissioner also notes that MOD's explanation that there was no requirement to answer requests in a piecemeal fashion and by not doing so it considered it a more efficient way to handle requests and any subsequent reviews and appeals.
37. The Commissioner can understand the MOD's position in relation to managing correspondence generated by FOI requests and potential subsequent appeals. However, he would emphasise that technically speaking, multiple requests within a single item of correspondence are separate requests for the purposes of FOIA. Therefore, in the Commissioner's opinion public authorities should be aware of their duty to respond promptly and in any event within 20 working days, to each individual request. Whilst each case must be judged on its own merits, in general the Commissioner would not advocate an approach that saw a public authority delaying its response to one request contained within a particular piece of correspondence simply because it was still compiling a response to other requests submitted at the same time.
38. The complainant also raised concerns with the Commissioner about the MOD's delays in completing the internal review. FOIA does not provide for a statutory time limit within which such reviews must be completed. These matters are, however, addressed in the Code of Practice, issued under section 45 of FOIA and in the Commissioner's guidance. In the Commissioner's view most internal reviews should be completed within 20 working days or 40 working days in complex cases. In the circumstances of this case the complainant requested an internal review on 12 February 2014. The MOD informed him of the outcome of the internal review on 12 August 2014. It therefore took the MOD 126 working days to complete its internal review. The Commissioner considers this to be an excessive period of time. This is particularly so

given the inordinate amount of time – some 195 working days – that it took the MOD to respond initially to the request.

39. The Commissioner would remind the MOD of its responsibilities in relation to responding to requests promptly and dealing with any internal reviews in a timely manner. Further failings by the MOD in either respect, especially of the egregious nature which occurred in this case, could lead to the Commissioner taking action against the MOD.

Right of appeal

40. 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@hmcts.gsi.gov.uk

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

41. 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.
42. 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
Information Commissioner's Office
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Wilmslow
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