

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 February 2011

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

Summary

The complainant requested information concerning the circumstances of the use of unmanned aerial vehicles by the armed forces. The public authority refused this request and cited the exemption provided by section 26(1)(b) (prejudice to the capability, effectiveness or security of the armed forces) of the Act. The Commissioner finds that this exemption was cited correctly and, therefore, the public authority is not required to disclose the information. The Commissioner also finds, however, that the public authority failed to comply with the requirement of section 17(3)(b) in its handling of the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made the following information request on 26 November 2009:

"(1) We would be very grateful if you would inform us of the number of Reaper Unmanned Aerial Vehicles (UAVs) that the UK currently has in service and the number of Reapers currently on order from General Atomics or that the UK is planning to acquire over the next 12 months.

(2) A FoI response dated 20th August 2008, published on the MoD website, states that Reaper UAVs have launched their weapons on seven occasions up until 19th July 2008. Can you confirm for us the number of times, since 19th July 2008 that British Reaper UAVs have launched their weapons and detail the circumstances surrounding the firing of weapons by British Reapers."

3. The public authority responded to this request on 21 December 2009. In response to request (1) the public authority disclosed the information requested. In response to request (2), the public authority disclosed details of the number of occasions on which British Reaper Unmanned Aerial Vehicles (UAVs) had launched weapons. However, in response to the request for the circumstances in which weapons had been fired, the public authority refused to disclose this information and cited the exemptions provided by sections 26(1)(a) (prejudice to the defence of the British Islands or of any colony) and 26(1)(b) (prejudice to the capability, effectiveness or security of any relevant forces) of the Act. Whilst these subsections were not cited specifically, it was evident from the wording within the refusal notice that these exemptions were believed to apply. It was stated in the refusal notice that the information in question included detail of the rules of engagement, but the refusal notice included little explanation as to why these exemptions were believed to be engaged and none as to why the balance of the public interest was believed to favour the maintenance of these exemptions.
4. The complainant responded to this on 20 January 2010 and requested that the public authority carry out an internal review in respect of that part of request (2) that was refused. The complainant stated at this stage that he did not agree with the exemptions cited by the public authority and questioned why compliance with his information request would involve disclosure of information relating to rules of engagement.
5. After a delay, which resulted partly through the complainant having been provided with an incorrect email address in the refusal notice, the public authority responded with the outcome of the internal review on 2 June 2010. This found that further information to that identified prior to the refusal notice was held, but concluded that all the information falling within the scope of the request, both that identified prior to the refusal notice and that identified later, was exempt under sections 26(1)(a) and (b). The exemption provided by section 27(1)(a) (prejudice to relations between the UK and any other state) was now also cited in relation to all of the information within the scope of the request. Some further explanation for the citing of these exemptions was given at this stage, although this response did not include separate reasoning as to why these exemptions were believed to be engaged and why the balance of

the public interest was believed to favour maintenance of these exemptions.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner in connection with this request on 26 July 2010. The complainant disagreed with the grounds given by the public authority for the refusal of his request for details of the circumstances in which UAVs had launched their weapons and suggested that the culture of the public authority led to a bias against the disclosure of information. The complainant also stated that he believed that the balance of the public interest favoured disclosure of the information requested due to "*public disquiet*" about the use of UAVs.
7. As recorded above, the public authority complied in full with the complainant's requests, except that part of request (2) for details of circumstances in which UAVs launched weapons. The analysis within this Notice relates only to that part of request (2).

Chronology

8. The Commissioner contacted the public authority on 29 November 2010. The public authority was asked to respond with further explanation for the application of the exemptions cited.
9. The public authority responded on 3 December 2010 with a document setting out the factors that had been considered by the public authority when refusing the request. Following this, a representative of the Commissioner's office visited the premises of the public authority and viewed the information within the scope of the complainant's request on 6 January 2011.

Analysis

Exemptions

Section 26

10. The public authority has cited the exemptions provided by sections 26(1)(a) and 26(1)(b). The Commissioner has focussed here on section 26(1)(b), which provides that information is exempt if its disclosure would, or would be likely to, prejudice the capability, effectiveness or

security of any relevant forces. Section 26(2) provides that “relevant forces” are the armed forces of the Crown and any forces co-operating with those forces. These sections are set out in full in the attached legal annex, as are all other sections of the Act referred to in this Notice.

11. Consideration of this exemption is a two-stage process. First, the exemptions must be engaged as a result of prejudice relevant to the wording of the exemption being at least likely to result. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
12. Covering first whether the exemption is engaged, the public authority has not specified whether its stance is that prejudice *would* result, or that prejudice *would be likely* to result. In these circumstances, the Commissioner will consider whether prejudice would be likely to result. The test applied here is that the likelihood of prejudice must be real and significant and more than hypothetical or remote. This is in line with the approach taken by the Information Tribunal in the case *John Connor Press Associates Limited v the Information Commissioner* (EA/2005/0005) in which it stated:

“the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.” (paragraph 15)

13. The first step here is to address whether the prejudice identified by the public authority is relevant to the wording of the exemption, before going on to consider the likelihood of this prejudice occurring. The public authority has advanced two main arguments as to how prejudice would be likely to occur through disclosure; that the effectiveness of UAVs would be reduced through the disclosure of operationally sensitive material, and that disclosure of information recording rules of engagement (ROE) would provide a tactical advantage to enemy forces. The view of the Commissioner is that it is clear that these arguments are relevant to the prejudice described in the exemption.
14. Turning to the likelihood of this prejudice occurring and whether this meets the test of “real and significant”, the most important factor here is the content of the information in question and what this suggests about the likelihood of prejudice. As noted above at paragraph 9, a representative from the Commissioner’s Office viewed the information in question. This showed that the content of the information includes very significant detail about the use of UAVs. This includes details of the circumstances in which they can be used, plans for specific UAV strikes and records of UAV strikes. This information also includes details of ROE relating to the use of UAVs.

15. As to what this content suggests about the likelihood of prejudice through the disclosure of operationally sensitive material, the Commissioner notes the level of detail within this information and accepts that this information is operationally sensitive in relation to the use of UAVs. The premise of the argument that this information could be utilised in such a way as to limit the effectiveness of UAVs is sound, based upon the content of this information.
16. The circumstances that applied at the time of the request are also highly relevant here. The armed forces of the Crown and their coalition allies were deployed in Afghanistan at that time and were subject to enemy action there. This increases the relevance of the concern of the public authority about the disclosure of operationally sensitive information.
17. Given the level of detail within the information in question and the specific nature of this content about the use of UAVs, and given the deployment of the armed forces and allied forces in Afghanistan at the time of the request, the Commissioner accepts that there is a real and significant likelihood of this information being utilised in a manner that would prejudice the effectiveness of UAVs. This conclusion relates to the argument made by the public authority that the effectiveness of UAVs would be likely to be reduced through disclosure.
18. The second argument advanced by the public authority was that disclosure of information recording ROE would provide a tactical advantage to enemy forces. The public authority believed that this prejudice would be likely to result through providing information on the limits to the use of force by the armed forces and their allies in Afghanistan.
19. Again, the content of the information in question is the most important factor here. This content includes specific details of the ROE in Afghanistan. These set out the circumstances in which particular levels of force can be used and the limits on the use of force. On the basis of this content, the Commissioner accepts that the premise of this argument is sound.
20. As to the likelihood of this as an outcome of disclosure, the circumstances in Afghanistan at the time of the request described above also apply in relation to this argument. This means that it is conceivable that there are those who would seek to use any information disclosed to the disadvantage of the armed forces and their allies. On the basis of the content of the information in question and the circumstances that applied at the time of the request, the Commissioner accepts that there is a real and significant likelihood that disclosure of the information recording ROE would provide a tactical advantage to enemy forces.

21. The Commissioner has accepted that both of the arguments advanced by the public authority as to how it believes that prejudice relevant to section 26(1)(b) would be likely to occur meet the test of “real and significant”. The overall conclusion of the Commissioner is, therefore, that the exemption provided by section 26(1)(b) is engaged.

The public interest

22. Having concluded that the exemption provided by section 26(1)(b) is engaged, it is necessary to go on to consider whether the balance of the public interest favours the maintenance of this exemption. In reaching a conclusion on the balance of the public interest here, the Commissioner has taken into account the general public interest in improving the transparency and openness of the public authority and the public interest in avoiding prejudice relevant to section 26(1)(b), which it is accepted would be likely to result through disclosure. This is in addition to those factors that relate to the specific information in question here, in relation to which the Commissioner has taken into account the arguments advanced by the complainant and by the public authority.
23. Covering first those arguments that favour disclosure, the activities of the armed forces in Afghanistan are the subject of very significant and legitimate public interest. The information in question here would improve public knowledge and understanding about the work of the armed forces in Afghanistan and the Commissioner regards this as a valid public interest factor in favour of disclosure of significant weight.
24. The role of the armed forces in Afghanistan has been the subject of controversy and the complainant has argued that specific controversy relates to the use of UAVs, stating that their use is the subject of *'much public disquiet'*. Brief research reveals that there is media coverage of controversy over the use of UAVs and the Commissioner accepts this as evidence that the controversy over the use of UAVs referred to by the complainant is genuine. The view of the Commissioner is that this controversy enhances the public interest in understanding more about the use of UAVs and that this is a public interest factor in favour of disclosure of some weight.
25. Also of significance is that large sums of public money have been spent on the procurement of UAVs. Disclosure would improve public understanding as to the results of this expenditure and the Commissioner regards this as a public interest factor in favour of disclosure of some weight.
26. The complainant has argued that the public authority operates a *'culture of secrecy'* and that this leads to a bias against disclosure. In this case, however, it is notable that the public authority satisfied the majority of

the requests set out above, clearly indicating that it considered whether it would be possible to disclose some of the information requested without incurring prejudice, rather than simply refusing the entirety of the complainant's requests. Given this, the Commissioner does not believe that it would be fair to argue that disclosure would be in the public interest in order to challenge a culture of unnecessary secrecy within the public authority.

27. Turning to those factors that favour maintenance of the exemption, the arguments advanced by the public authority relate to the public interest in avoiding the prejudice described in the exemption. The public authority believes that a reduction in the effectiveness of UAVs and disclosure of the details of ROE would be likely to threaten the security of the armed forces and their allies in Afghanistan. Again, when analysing whether the exemption is engaged, the circumstances in Afghanistan at the time of the request and the gravity of that situation is highly relevant here.
28. The Commissioner has concluded that there is a real and significant likelihood that disclosure would prejudice the capability, effectiveness and security of the armed forces in Afghanistan. The view of the Commissioner is that the public interest in avoiding this prejudice weighs very substantially in favour of maintenance of the exemption.
29. Whilst the Commissioner has accepted valid factors in favour of disclosure, his view, given the gravity of the situation faced by the armed forces and their allies in Afghanistan at the time of the request, is that it would be necessary for these factors to be of exceptionally significant weight in order for them to at least equal the public interest in avoiding the prejudice described in the exemption. In the event, the Commissioner does not believe that the factors in favour of disclosure carry such weight. His conclusion is, therefore, that the public interest in the maintenance of the exemption provided by section 26(1)(b) outweighs the public interest in disclosure.

Sections 26(1)(a) and 27(1)(a)

30. As the conclusion above on section 26(1)(b) relates to the entirety of the information within the scope of the request, it has not been necessary to go on to consider the other exemptions cited by the public authority.

Procedural Requirements

Section 17

31. In failing to address why the exemptions were believed to be engaged separately from the assessment of the public interest, the public authority did not comply with the requirement of section 17(3)(b).

The Decision

32. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemption provided by section 26(1)(b) correctly. However, the Commissioner has also found that the public authority failed to comply with the requirement of section 17(3)(b) in its handling of the request.

Other matters

33. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to respond with the outcome of the review within twenty working days. Neither did the public authority respond within 40 working days. The public authority should ensure that internal reviews are carried out promptly in future.

Right of Appeal

34. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 23rd day of February 2011

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 26(1) provides that –

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

- (a) the defence of the British Islands or of any colony, or
- (b) the capability, effectiveness or security of any relevant forces."

Section 27(1) provides that –

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

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad."