

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 Ministry of Defence to provide details of the total number of weapons released by British Reaper Unmanned Aerial Vehicles in Afghanistan since 2008. The complainant also asked for that figure to be broken down, by year, into how many weapons were released under daily air tasking orders and how many were released under dynamic targeting procedures. The MOD confirmed the total number of weapons releases and broke this figure down by year. However, it argued that breaking these figures into the two categories specified in the request would result in the disclosure of information which was exempt from disclosure on the basis of the section 26(1)(b) of FOIA (the defence exemption). The Commissioner is satisfied that the withheld information is exempt from disclosure on this basis.

Request and response

2. On 28 May 2012 the complainant submitted the following request to the MOD:

'I would like to request under the FoI Act information about the release of weapons from British Reaper UAVs in Afghanistan. Can you tell me, for each year since 2008, how many weapons were released from British Reapers UAVs under daily air tasking orders and how many were released under dynamic targeting

procedures? Can you also tell me the total number of weapon releases from British Reaper UAVs in Afghanistan to date?’

3. The MOD responded on 6 June 2012 and refused to comply with this request on the basis of section 14(2) of the FOIA which allows a public authority to refuse a request if it considers it to be a repeated request.
4. The complainant contacted the MOD on 20 June 2012 and disputed the MOD’s position that his request was a repeated one.
5. The MOD informed him of the outcome of the internal review on 10 July 2012. The review acknowledged that section 14(2) had been misapplied and therefore the MOD provided the complainant with a breakdown, by year, of the number of Reaper weapons releases in Afghanistan to date. However, the MOD explained that to further breakdown these annual figures under the two categories specified in the request would result in the disclosure of information which is exempt under section 26(1)(b) of FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 23 August 2012 in order to complain about the way his request for information had been handled. The complainant argued that disclosure of the information that the MOD had withheld would not result in the prejudicial consequences it envisaged and in any event he believed that the public interest favoured disclosing the information. The complainant provided the Commissioner with detailed submissions to support his complaint which the Commissioner has referred to in his analysis below.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...’

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 FS50462269.

...(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:
- 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.

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

11. More specifically the complainant argued that it was difficult to understand why breaking down the annual weapons release between those that were released as part of pre-planned operations and thus included in the daily tasking orders, and those that were released under dynamic tasking procedures, could be useful to the enemy since it is generally known/assumed that UAVs are used in both ways. To draw a parallel to ground operations, although the number of ground engagements is not known (or likely to be recorded separately), it would be of no assistance to the enemy to know how many engagements were planned and how many occurred due to happenstance, unless linked to specific incidents. The complainant acknowledged that it may be the case that it is clear from the figures that Reaper UAVs are not able to be used in one of the two ways described in his request, but even if that was the case the MOD had not sufficiently explained how knowledge of this fact would assist the enemy.
12. 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).³ 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 the MOD argued that disclosure of the withheld information would (as opposed to simply being likely to) prejudice the security and effectiveness of the UK's armed forces on current operations. In particular this information could be used by enemy forces to gain insight into specific circumstances under which the Reaper UAV is tasked to deploy weapons. The MOD explained that it believed that there was a real and significant risk that enemy forces would use this information to improve their techniques, tactics and procedures in a way that would prejudice the effectiveness of UAVs. The MOD noted that it was unable to explain more about the reasons for withholding this information without disclosing information which in itself would result in prejudicial information being disclosed.

³ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i571/appger-v-ic-judgment.pdf>

14. As part of his investigation of this complaint, the Commissioner asked the MOD to provide him with a clear and detailed explanation which set out why disclosure of the withheld information would be of use to the enemy. The MOD provided the Commissioner with detailed information to address these inquiries. However, the Commissioner cannot refer to the MOD's arguments in any detail in this notice because the MOD's submissions to support the application of section 26(1)(b) in this case also contain information which itself is exempt from disclosure under the same exemption.

The Commissioner's position

15. 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 occur if the information was disclosed is applicable to section 26(1)(b).
16. 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 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.
17. 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. As noted above, in its internal review the MOD explained that it considered the higher level of prejudice to be met.
18. 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 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. Furthermore, the Commissioner is also satisfied that the likelihood of this prejudice occurring is one that meets the higher threshold of likelihood.

19. 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 in particular 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.
20. 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

21. 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

22. The MOD argued that there was a very 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 prejudice the effectiveness of UAVs.

Public interest arguments in favour of disclosing the information

23. 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.

25. 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'⁴. The complainant argued that this clear understanding could only be aided by information about how UAVs are being used in Afghanistan.
26. The complainant argued that if the withheld information revealed that the Reaper UAVs were not able to be used in one of the two ways specified in his request, then there was an added public interest in disclosure of that information in order to ensure that further public money was not spent on a system that cannot be used appropriately.
27. 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

28. 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

⁴ 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>

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 something about the circumstances under which the weapons had been deployed. 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.

29. However, for the reasons discussed above 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 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 in this case 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 favours maintaining the exemption.

Right of appeal

30. 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

31. 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.
32. 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
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