

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 January 2019

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

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the Ministry of Defence (MOD) seeking information about 'go cold' and missile malfunction events concerning unmanned aerial vehicles (UAVs) for the last five years. The MOD provided the complainant with some of the information falling within the scope of his request but sought to withhold the remainder on the basis of sections 26(1)(b) (defence), 27(1)(a) and (d) (international relations) and 43(2) (commercial interests) of FOIA. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 26(1)(b) and that in all of the circumstances of the request the public interest favours maintaining this exemption.

#### Request and response

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2. The complainant submitted the following request to the MOD on 13 April 2018:

*'Under the Freedom of Information Act 2000, please can you provide me with:*

1. *An annual list of all so-called 'go cold' events for each of the last 5 calendar years including 2017 concerning UAV or drone missions. Please provide a) the month and year it occurred b) the conflict country (e.g. Iraq, c) the type of aircraft and missile/ordnance d) the reason for it being termed a 'go cold' event e) any outcomes known e.g. where the missile landed.*

*'Go cold' events are occasions which are obligated to be recorded when ordinance/missiles need to be redirected or prevented from reaching a target because of a change in circumstances between firing and impact i.e. something unexpected occurred.*

- 2. An annual list of all so-called ordinance/missile malfunction events for each of the last 5 calendar years including 2017 concerning UAV or drone missions. Please provide a) the month and year it occurred b) the conflict country (e.g. Iraq, c) the type of aircraft and missile/ordnance d) the reason for it being termed a 'malfunction' event e) any outcomes known e.g. where the missile landed.*

*Malfunction events are occasions which are obligated to be recorded when ordinance/missiles malfunction in some way.*

*Please send me the data requested in the form of an Excel spreadsheet or as a csv file.'*

3. The MOD responded on 24 May 2018. It provided the complainant with a table containing the information sought by parts (a), (b) and (e) of question 1 and confirmed that all the information provided related to Hellfire missiles released from MQ-9 Reaper RPAS; there were no events relating to other UAV or ordnance types. However, the MOD explained that the information sought by part (d) of question 1 and all of the information sought by question 2 was exempt from disclosure on the basis of sections 26 (defence) and 43 (commercial interests) of FOIA.
4. The complainant contacted the MOD on 8 June 2018 and asked it to conduct an internal review of this response. He questioned the application of both exemptions and also argued that the information provided in response to part (e) of question 1 did not answer this aspect of his request; he expected the information provided to refer to where and what the missile then went on to hit, i.e. a house, road, civilians, people not simply a limited description of where it hit.
5. The MOD informed the complainant of the outcome of the internal review on 28 September 2018. The review upheld the application of the exemptions contained at sections 26(1)(b) and 43(2) of FOIA. The review did not refer directly to the complainant's concern that the information provided in response to part (e) of question 1 did not meet this aspect of the request.

## Scope of the case

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6. The complainant contacted the Commissioner on 11 September 2018, prior to the MOD completing its internal review response, in order to complain about its handling of his request. More specifically, he disputed the MOD's reliance on sections 26(1)(b) and 43(2) as a basis for withholding the information sought by part (d) of question 1 and all of the information sought by question 2. He also remained of the view that the information provided by the MOD in response to part (e) of question 1 did not fulfil this part of his request.
7. During the course of the Commissioner's investigation, the MOD clarified its position in respect of the requested information. The MOD confirmed that it considered the exemptions cited in correspondence with the complainant to apply to the withheld information. However, it now also considered all of the withheld information to be exempt from disclosure on the basis of section 27(1)(a) and (d) (international relations) of FOIA. It also confirmed that it did hold further information falling within the scope of part (e) of request 1, beyond that previously disclosed to the complainant, however it considered this further information to also be exempt from disclosure on the basis of section 26(1)(b) of FOIA.

## Reasons for decision

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### Section 26 - defence

8. 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.'*

9. 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 MOD's position

10. In its internal review response the MOD acknowledged that 'strike rates' and the ratio of hits and misses for kinetic effects have been divulged for previous operations, such as Operations ELLAMY (UK military action in Libya). However, it argued that there was a concern that the release of excessive detail of airstrikes, such as the withheld information in this case, could compromise future operations by revealing some logistical constraints and the Tactics, Techniques and Procedures (TTPs) being employed by the British Armed Forces. More specifically, the MOD argued that release would be likely to assist opposing forces in building up a detailed picture of UK tactics and strike capabilities. It argued that enemy forces could then adjust their efforts in training, tactics and planning activities to exploit the likely use (and any perceived limitations) of UAV operations, including Reaper, for both the UK and other allied forces to enable development of measures to counter them. The MOD argued that this could have a severe detrimental effect on any future operations and negatively impact on British military effectiveness in the future.
11. The MOD's submissions to the Commissioner elaborated on this line of argument and noted that whilst some of the data which relates to Afghanistan is historic, the Iraq/Syria data related to ongoing operations and in any event the decisions taken relating to Afghanistan were just as applicable to operations in Iraq/Syria. The MOD therefore emphasised that the release of the withheld information would compromise current and future operations. The MOD also explained that it had determined that the level of prejudice was engaged at the higher level of 'would' rather than the lower level of 'would be likely to'.

### The Commissioner's position

12. With regard to the first criterion of the test set out at paragraph 9, 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.
13. Having considered the submissions provided to her by the MOD, the Commissioner is satisfied that disclosure of this clearly has the potential to harm the capability and effectiveness of UK forces in operations both in respect of current operations in Iraq/Syria and in future operations.

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.

14. 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 MOD's arguments and considering the content of the withheld information the Commissioner is satisfied there is a real and significant risk of this prejudice occurring as the information would directly assist enemy forces in building up a picture of the targeting practices. She also agrees with the MOD that the higher threshold of would prejudice is met.
15. The Commissioner has therefore concluded that section 26(1)(b) is engaged in respect of all of the withheld information.

### **Public interest test**

16. 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*

17. The MOD acknowledged that there is a public interest in understanding how British Armed Forces work to protect interests abroad, and how their assets are used. The MOD noted that release would also demonstrate openness and transparency and increase public confidence and trust in overseas operations. The MOD acknowledged as 'strike rates' and the ratio of hits and misses for kinetic effects have been divulged for previous operations, there is a public interest in releasing similar statistics for Operation SHADER (UK military operations against Daesh).
18. The complainant argued that disclosure of the withheld information would clearly further the understanding and participation in the public debate of issues of the day. He argued that this was palpably an area of significant public interest given the limited accountability of the MOD to publish information about the rare occasions where military activity goes wrong. The complainant noted that recently, the MOD was forced to

admit that it had been aware of a civilian casualty only after reporting on the subject. Moreover, the complainant argued that disclosure of the withheld information would help bring to light information affecting the public health and safety of civilians in war zones, a matter of grave national importance.

19. Furthermore, the complainant argued that the public may have more confidence in the MOD and be more supportive of key decisions if they understand the efficacy of these weapons, without this information being withheld. Indeed, the complainant suggested that the public have a natural concern about the effectiveness of the armed forces, and any risks to the safety of military personnel and civilians. Military action can result in loss of life, and subsequent discussions about the safety of equipment or direction of the operation. The complainant suggested that disclosure of this information could support improvements to equipment or planning, and allow individuals to challenge the basis of decisions affecting them personally. Disclosure also supports accountability and transparency in the use of public funds. The complainant argued that the general public has a very clear interest in knowing that monies collected, for example through taxation, have been properly and efficiently spent.

*Public interest in maintaining the exemption*

20. The MOD argued that it was firmly against the public interest to undermine the effectiveness of British military operations. Given the insight disclosure of the withheld information would provide to enemy forces in respect of UAV operations, both current and future, the MOD concluded that the public interest favoured maintaining the exemption.

*Balance of the public interest test*

21. The Commissioner recognises that there is a public interest in the disclosure of information about how the British armed forces use airstrikes to achieve the aims of particular operations. Furthermore, the Commissioner agrees with the complainant that there is a significant public interest in disclosure of information which would provide the public with an insight into both go cold events and missile malfunctions given the concerns that have been raised by some parties about the consequences of RAF strikes against IS.<sup>1</sup> Disclosure of the withheld information would provide the public with a direct insight in such go cold events, beyond that provided by the information already disclosed to the

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<sup>1</sup> See for example the news article ['RAF strikes on IS in Iraq 'may have killed civilians''](#)

complainant, as well as providing a direct insight into events involving missile malfunctions. Therefore, in the Commissioner's view the public interest in disclosure should not be underestimated. However, the Commissioner believes that there is an exceptionally weighty public interest in protecting the capability, effectiveness and security of British armed forces. 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. Furthermore, the Commissioner is conscious that disclosure of the withheld information risks undermining the effectiveness of both current and future UAV operations. 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.

22. In light of her findings in relation to section 26(1)(b), the Commissioner has not considered the MOD's reliance on the exemptions contained at sections 27(1)(a) and (d) and section 43(2) of FOIA.



## Right of appeal

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23. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

24. 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.
25. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**