

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 11 June 2019

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

#### **Decision (including any steps ordered)**

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1. The complainant submitted three requests to the Ministry of Defence (MOD) seeking information about Reaper, an unmanned aerial vehicle. The MOD provided some information in response to request 1 but sought to withhold the remaining information in the scope of this request on the basis of section 26(1)(b) (defence) of FOIA. It applied the same exemption to withhold the information falling within the scope of request 2, and also argued that section 27(1)(a) (international relations) of FOIA applied to that information. In respect of request 3, the MOD provided the complainant with some of the information in scope but explained that it did not hold any further information, or alternatively that to locate any potentially relevant information would exceed the appropriate cost limit at section 12(1) of FOIA.
2. The Commissioner's decision is that in respect of request 1 the information being withheld is exempt from disclosure on the basis of section 26(1)(b) of FOIA and whilst this exemption does not provide a basis to withhold the information in the scope of request 2, that information is exempt from disclosure on the basis of section 27(1)(a) of FOIA. In respect of both exemptions, the Commissioner is satisfied that the public interest favours maintaining the exemption and withholding the information in question. In respect of request 3, the Commissioner has concluded that the MOD holds some information falling within the scope of the request but that to provide this information would exceed the appropriate cost limit and therefore section 12(1) applies to this request.

## Request and response

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3. The complainant submitted the following request to the MOD on 10 May 2018:

*'Please can you tell me under the Freedom of Information Act:*

*1) How many RAF Reaper qualified pilots and sensor operators are currently assigned to a) 39 Squadron b) 13 Squadron, c) embedded with USAF d) assigned elsewhere?*

*2) How many RAF personnel have qualified as Reaper pilots and sensor operators in each of the last five years (2013-2017)?*

*3) Which companies support the RAF in a) the training of RAF Reaper personnel and b) the maintenance and support of RAF Reapers?'*

4. The MOD contacted the complainant on 6 June 2018 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of section 26 (defence) of FOIA but it needed additional time to consider the balance of the public interest test. The MOD sent a further public interest extension letter on 6 July 2018.
5. The MOD provided the complainant with a substantive response to his request on 20 July 2018. In response to request 1d) the MOD explained that no personnel were embedded elsewhere and in respect of request 1c) explained that four personnel were embedded with the US Air Force. However, the MOD refused to clarify whether such personnel were pilots or sensor operators and also sought to withhold the remaining information falling within the scope of the request 1, and all of the information sought by request 2, on the basis of section 26 of FOIA. Nevertheless, the MOD did provide the total number of pilots and sensor operators assigned to each Squadron. In response to request 3, the MOD explained that *'All training and maintenance of UK Reaper Remotely Piloted Aircraft Systems is contracted through a Foreign Military Sales agreement with the US government.'*
6. The complainant contacted the MOD on 25 July 2018 and asked for an internal review of this response to be conducted. In particular, he asked the MOD to respond to request 2 in the same manner in which it had responded to request 1, ie by providing just the total figure of pilots and sensor operators in each of the last five years. With regard to request 3, he argued that it was not credible that the MOD did not hold information falling within the scope of this request.

7. The MOD acknowledged receipt of the internal review on 9 August 2018 and explained that it aimed to process this within 40 working days. The MOD also explained that the complainant's request for the total number of personnel qualified as pilots and sensor operators would be processed as a separate request under reference FOI2018/10410.<sup>1</sup>
8. The MOD informed the complainant of the outcome of the internal review on 14 December 2018. The MOD argued that the information sought by requests 1 and 2 was exempt from disclosure on the basis of section 26(1)(b) of FOIA. The MOD also explained that no information was held on what companies are used to train RAF Reaper personnel, albeit that the MOD did hold – and provided – the names of the companies used to maintain and support RAF Reapers.
9. During the course of the Commissioner's investigation of this complaint, the MOD contacted the complainant again on 11 April 2019. It explained that it had originally interpreted part 3(a) of the request to only mean companies involved or conducting Reaper personnel qualification training. However, it explained that on further consideration it considered that the scope of this request should be widened to also cover companies involved in skills training of existing Reaper personnel. The MOD explained to the complainant that the RAF used contractor support in the delivery of a 'Remotely Piloted Aircraft System (RPAS) Qualified Weapons Instructor' course. The MOD provided the complainant with the name of the contractor involved in supporting this activity. Furthermore, the MOD also explained to the complainant that in addition to section 26, it also considered the information falling within the scope of part 2 of the request to attract the exemption contained at section 27(1)(a) (international relations) of FOIA.

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<sup>1</sup> The MOD responded to request FOI2018/10410 on 29 August 2018 and refused to provide the number of Reaper pilots and sensor operators who qualified in each of the past five years. However, the MOD provided the total number of personnel who had qualified as a pilot or sensor operator over the past five years.

## Scope of the case

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10. The complainant initially contacted the Commissioner on 27 September 2018 in order to complain about the MOD's failure to complete the internal review in relation to his request of 10 May 2018. Following the completion of the internal review the complainant explained to the Commissioner that he remained dissatisfied with the MOD's handling of his request. More specifically, he raised the following grounds of complaint:

- He disputed the MOD's decision to withhold the information sought by parts 1 and 2 of the request on the basis of the exemptions cited;
- He disputed the MOD's position that it did not hold details of the Reaper qualification training of RAF personnel; and,
- He was dissatisfied with the time taken by the MOD to complete its internal review response.

## Reasons for decision

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### Requests 1 and 2

#### Section 26

11. 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.'*

12. 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*

13. The complainant noted that the MOD's line of argument was that disclosure of the withheld information 'could potentially' be used by those with a hostile intent, and disclosure would merely provide an 'indication' of the Reaper tasking lines that could be supported, an 'indication' of the size and structure of the task force, and an 'indication' of the growth figures of the task force through extrapolation. The complainant argued that all of these possibilities are somewhat vague and do not cross the threshold of the level of danger need to engage the exemption.
14. The complainant also drew the Commissioner's attention to a number of Parliamentary Questions (PQs) in which the MOD had previously given details of Reaper pilot numbers.<sup>2</sup>

#### *The MOD's position*

15. In its internal review response, the MOD explained that there is a degree of sensitivity about the number of UK Reapers which form part of the UK Forces' wider air capability. More specifically it argued that revealing a breakdown of the number of pilots and sensor operators would provide an indication of the number of Reaper tasking lines that could be currently supported. The MOD argued that this information could, potentially, be used by those with hostile intent to threaten the integrity and security of future UK military operations and therefore putting the safety of UK armed forces personnel at risk. The MOD argued that release of the current assignment figures in a broken-down format could give an indication of the size and structure of the Reaper task force when connected with information already in the public domain. Furthermore, the MOD argued that the release of detailed growth figures, which yearly training statistics could reveal, could give an indication of the capability of the Reaper task force through extrapolation.

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<sup>2</sup> Details of the PQs identified by the complainant are detailed in the annex which is attached to this decision notice.

16. In its submissions to the Commissioner, the MOD elaborated on this argument by explaining that the requested breakdowns would give an individual the ability to surmise how many crews are available to each squadron, the MOD's overall operational capacity and, through extrapolation, assess the shift patterns of crews coming in and out of the base to support operations. The MOD pointed to previously published statistics relating to the flying hours of particular Reaper aircraft over set periods. It argued this information, allied to the withheld information, might allow an aggressor to not only calculate how many lines are flown out of a base, but also to target individuals by calculating their continuous shift patterns and assessing/following their vehicle movements in and out of the base. The MOD explained there had been repeated incidents of personal security threats and there was concern that release of the withheld information may place them at further risk.
17. In summary, the MOD explained to the Commissioner that section 26(1)(b) had been applied because the withheld information showed the development of this capability, and in addition to placing its personnel at risk, the potential harm to current defence operations which could in turn lead to an increased threat to the UK and its allies in the joint fight against terrorism.
18. The Commissioner specifically asked the MOD to comment on the fact that similar information to the withheld information had been released in response to previous PQs, as identified by the complainant.
19. In response, the MOD explained that the information released in the PQs only related to the number of qualified Reaper pilots, not the number of sensor operators or the numbers of each role that are assigned to a particular Squadron. The MOD explained that in its view this does not reveal the full capability of the Reaper force in terms of tasking lines and trends. In particular, the MOD noted that although the response to the PQ dated 1 October 2012 does reveal the number of pilots trained in a single year, this is not provided in conjunction with the number of sensor operators trained and therefore does not reveal an insight into the potential change of ability within the Reaper force. Again, the MOD emphasised that it is the release of the yearly breakdown of training figures for both pilots and sensor operators which could allow an individual to calculate crew and manning growth and therefore the number of tasks the RAF could support, prejudicing the UK Forces' wider air capability. The MOD also explained that it is necessary to add that the sensitivities of such information have changed over time, with the theatre of operations evolving. On reflection, the MOD explained that the information released as part of the PQ would not be released were it to be requested today.

*The Commissioner's position*

20. With regard to the first criterion of the test set out at paragraph 12, 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.
21. With regard to the second criterion, having considered the submissions provided to her by the MOD the Commissioner is also satisfied that disclosure of both sets of withheld information, ie a breakdown of the current number of pilots and sensor operators (request 1) and breakdown of training figures (request 2), has the potential to harm the capability and effectiveness of UK forces in respect of the Reaper taskforce. This is because such information could be used by those with hostile intent to gain some insight into the capability of the Reaper force. 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.
22. However, in relation to the third criterion, the Commissioner is not persuaded that the risk of prejudice occurring if the information sought by request 2 was disclosed is one that it is more than hypothetical. The Commissioner accepts that although disclosure of this information would clearly reveal the number of pilots and sensor operators trained each year, in her view the insight it would provide to current operational capabilities is limited given that presumably over the five year period covered by the request at least some of the existing pilots and sensor operators will have left their posts. Therefore, the raw training numbers does not necessarily equate to the operational capabilities. Moreover, the information sought by request 2 does not given an indication as which squadron such newly trained personnel are based nor indicate whether they embedded with the USAF. Therefore, even taking into account the availability of other information in the public domain, the Commissioner is not persuaded that disclosure of the information sought by request 2 is one that is anything more than speculative.
23. In contrast, the Commissioner is satisfied that disclosure of the information sought by request 1 would provide a direct insight into current operational capabilities of the Reaper taskforce given it is public knowledge that each crew is made up of one pilot and sensor operator (plus a mission intelligence co-ordinator). Therefore, the Commissioner accepts that disclosure of this information would be provide an insight into the number of lines that the Reaper taskforce is capable of flying. In

turn the Commissioner accepts that such information could be used by those with a hostile intent to gain an insight, allied to other information the public domain, which would undermine the effectiveness of the Reaper force.

24. In summary, the information in the scope of request 2 is not exempt from disclosure on the basis of section 26(1)(b). However, the information sought by request 1 is exempt from disclosure on the basis of this exemption.

### **Public interest test**

25. 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 falling within the scope of request 1 which the MOD is seeking to withhold.

#### *Public interest in favour of disclosing the withheld information*

26. For its part, the MOD accepted that release of the information would increase public understanding of the UK Reaper force, which plays a huge role in support of attack and intelligence gathering missions and increase public confidence and trust in how overseas operations are conducted, as well as promoting openness and transparency about such matters. The MOD also acknowledged that disclosure would provide an insight into the working relationship between a Reaper pilot and sensor operator providing the public with a greater understanding of the how the Reaper force operates.
27. The complainant argued that the use of armed unmanned systems like Reaper is highly controversial and there is great interest from the press, academia and the public about the details of their use. He suggested that many of the ethical and legal issues questions that arise from the use of these systems can only be examined and answered through having greater understanding of their day-to-day use.
28. The complainant argued that one important issue in regard to the use of armed drones is recruitment and retention of drone crew. He noted that in the US there are multiple and consistent reports detailing the difficulty of recruiting and retaining pilots and crew for remotely piloted



aircraft for multiple reasons.<sup>3</sup> In the UK the complainant noted that RAF Reaper crews have spoken about the heavy workload, in part apparently due to lack of qualified crew.<sup>4</sup> The complainant argued that as the MOD has now committed hundreds of millions of pounds of public money to increase the number of armed drones in its inventory from 10 to 20, it is of great public interest to know if the UK has been able to recruit and train personnel to operate these systems. He argued that this was more than just about 'increasing public understanding' but rather about proper public accountability.

#### *Public interest in maintaining the exemption*

29. 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 unmanned aerial vehicle (UAV) operations, both current and future, the MOD concluded that the public interest favoured maintaining the exemption.

#### *Balance of the public interest arguments*

30. The Commissioner recognises that there is a public interest in the disclosure of information which would further the public's understanding about how the MOD uses the Reaper force, not least because of the significant role it plays in overseas operations. Furthermore, the Commissioner agrees with the complainant that there is a genuine and specific public interest in disclosure of the withheld information in order to demonstrate whether the MOD has the necessary personnel to fly the increased number of Reapers that it now has. The Commissioner agrees with the complainant that this is a genuine question of accountability given the amount of money invested in this system and moreover, as noted above, the key role it plays in overseas operations. Taking these

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<sup>3</sup> The complainant cited the following sources as evidence of this 'Stress and Dissatisfaction in the Air Force's Remotely Piloted Aircraft Community', Rand Corporation, 2017, [https://www.rand.org/pubs/research\\_reports/RR1756.html](https://www.rand.org/pubs/research_reports/RR1756.html)

'Air Force, Running Low on Drone Pilots, Turns to Contractors in Terror Fight', The New York Times, Sept 2016, <https://www.nytimes.com/2016/09/06/us/air-force-drones-terrorism-isis.html>;

'Air Force Will Offer Bonuses To Lure Drone Pilots', Wall Street Journal, July 2015, <https://www.wsj.com/articles/air-force-will-offer-bonuses-to-lure-drone-pilots-1436922312>

<sup>4</sup> "It was incessant". Former RAF Reaper pilot speaks to Drone Wars', Drone Wars UK, May 2017, <https://dronewars.net/2017/05/30/justin-thompson-interview>

factors into account, 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. 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 and withholding the information falling within the scope of request 1.

### **Section 27 – international relations**

31. As the Commissioner has concluded that the information falling within the scope of request 2 is not exempt from disclosure on the basis of section 26(1)(b) she has considered the MOD's alternative position that this information is exempt from disclosure on the basis of section 27(1)(a).
32. Section 27(1)(a) of FOIA which states 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'*
33. In correspondence with the complainant the MOD argued that disclosure of the withheld information regarding training figures would have a negative impact on the strong relationships the UK has not only with the US, who conduct the training of RAF personnel, but also with other partner nations who use Reaper. The MOD explained that it was unable to provide any further explanation in support of its application of this exemption because to do so would potentially involve the disclosure of information which is itself exempt from disclosure. The MOD therefore noted that it was not obliged under section 17(4) of FOIA to provide any further details as to why this exemption applied.
34. The MOD provided the Commissioner with more detailed submissions to support its reliance on section 27(1)(a), albeit for the reasons set out in the previous paragraph such submissions cannot be included in this decision notice. Nevertheless, the Commissioner can confirm that having considered these submissions, she is satisfied that each of the criterion set out in the three limb test above at paragraph 12 are met and that disclosure of information sought by request 2 would be likely to

prejudice the UK's interests both with the US and with other countries who fly the Reaper.

### **Public interest test**

35. Section 27 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 27(1)(a) of FOIA outweighs the public interest in disclosing the information.

#### *Public interest in favour of disclosing the withheld information*

36. The complainant's arguments for disclosing the withheld information are set out above.
37. In the context of section 27 and the specific information sought by request 2, the MOD acknowledged that disclosure of the information would increase the public's understanding of the training rates of RAF Reaper pilots and sensor operators which would, in turn, increase public understanding of the UK Reaper Force. The MOD argued that it would also promote confidence and trust in the partnership it currently has with its allies, particularly with regards to the training of RAF personnel potentially involved in the protection of the UK.

#### *Public interest in maintaining the exemption*

38. However, the MOD argued that it would be firmly against the public interest if the UK's relations with the US, and other countries who used Reaper, were damaged.

#### *Balance of the public interest*

39. For the reasons discussed above, the Commissioner agrees that there is significant public interest in the disclosure of information which would inform the public about how successful the RAF has been in training numbers of Reaper pilots and sensor operators. Furthermore, she agrees with the MOD that there is additional public interest in disclosure of the information as this would provide an insight into the partnership the UK has with the US in respect of the providing this training. However, the Commissioner is conscious that the RAF relies on the US to provide training for Reaper pilots and sensor operators and in light of this she accepts that it is firmly against the public interest for the UK's relationship with the US in this context to be damaged. Therefore, the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 27(1)(a) and withholding the information falling within the scope of request 2.

### Request 3

40. As explained above, during the course of the Commissioner's investigation the MOD clarified how it had interpreted request 3(a) which sought details of '*Which companies support the RAF in a) the training of RAF Reaper personnel*'. The MOD acknowledged that this request should be interpreted to include both companies involved or conducting Reaper personnel qualification training and also companies involved in skills training of already qualified Reaper personnel. The MOD has provided the complainant with details of the company providing the latter form of training. However, the MOD's position remains that it does not hold a list of the companies involved in providing the first form of training, and/or alternatively that any information that it does hold which may provide an indication of the companies involved, would exceed the cost limit to provide.
41. The complainant disputes both the MOD's position that it does not hold such a list and its alternative position that to provide any information relevant to this request which it may hold would exceed the cost limit.

#### *The MOD's position*

42. The MOD explained that in order to locate information relevant to request 3(a), it conducted searches within the electronic holdings of Defence Equipment and Support (DE&S) Unmanned air systems secretariat and the Air Intelligence Surveillance Target Acquisition and Reconnaissance Group. In particular, searches were carried out within relevant email accounts, and on MOD SharePoint Sites but no information has been relevant to the request had been located.
43. However, the MOD explained that the training in question was, and continues to be, carried out by the US Air Force through a Foreign Military Sales (FMS) agreement with the US government and MOD are not aware what contractors or sub-contractors are used to carry out the training. The MOD explained that the nature of FMS arrangements means that the UK and RAF bid for a specific service or capability, in this case Reaper training. This is provided by the US Air Force Secretary of the Air Force, International Affairs (SAFIA) organisation which conducts all commercial negotiations, act as an intermediary and specifically prohibit any direct contact with contractors in most cases. Therefore, the MOD explained that it was entirely unqualified to provide a comprehensive list of companies supporting RAF Reaper training.
44. Nevertheless, the MOD acknowledged that it did hold some emails and correspondence which may provide an indication of the companies involved (for example, where they may have been listed as copy addressees on emails), but that such information would only be correct

at the time; the MOD would have no visibility of when SAFIA renegotiate or reallocates a contract to support RAF RPAS training. Furthermore, the MOD argued that mining such information across the MOD, in particular DE&S, PJHQ, JFC, HQ Air and operational squadrons from over 10 years of RAF RPAS operations would significantly exceed the time limit under section 12 of FOIA.

45. In support of this position, the MOD explained that the effort in conducting such a search is difficult to estimate, but advised that there would be a requirement to search through at least 6 IT systems, of differing classification and may be subject to strict access controls that limit the number of personnel who can conduct the work. Searches of both current and archived holdings in these systems would have to be conducted to identify information that might in scope of part 3 of the request. In addition, the MOD believed that more than twenty email accounts of individual users would have to be searched, possibly covering thousands of emails, and tens of thousands of documents all of differing volume.
46. The MOD explained that the team which is most likely to hold information, if it is held, has been involved in the Reaper project for over 10 years and accumulated a lot of information in this time. The MOD estimated that it could take a minimum of 200 hours for an individual to locate, retrieve and extract any information that might be held electronically on one or more of the relevant systems. It also suggested that it would be very difficult for it to offer any way of refining this part of the request that might be useful to the requester, and even if the complainant were to submit a more refined request, it is highly likely that the information would still be subject to the same restrictions on release under section 27 of FOIA, due to the US FMS Sales contract in place. The MOD explained that its advice to the complainant was to consider submitting a request about Reaper training to the USAF's Deputy Under Secretary for International Affairs under the Freedom of Information Act (5 US Code, Section 552), <https://www.foia.gov/faq.html>.

#### *The complainant's position*

47. The complainant argued that it was simply not credible for the MOD to suggest it did not hold any information on which companies are involved, even if such arrangements were made through FMS. He argued that it was not sustainable to suggest that the MOD would not know (or want to know) which companies were carrying out the training of its Reaper personnel or maintaining what it sees as a vital component of UK defence.

48. The complainant also raised concerns with the Commissioner that the MOD were seeking to rely on section 12(1) of FOIA so late in this process and indeed concerns that the Commissioner would be prepared to allow it do so.

*The Commissioner's position*

49. In cases where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
50. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
51. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches as well as other explanations offered as to why the information is not held.
52. With regard to whether the MOD holds a comprehensive and/or easily accessible list of the companies providing reaper qualification training, the Commissioner can understand the complainant's scepticism that the MOD would not hold, or wish to hold such information. The Commissioner accepts that it is reasonable to assume that the MOD would have a business purpose to hold such information.
53. However, the Commissioner recognises that the MOD has conducted searches within the relevant areas of the organisation which would be likely to hold such details of the companies involved in the training, ie DE&S Unmanned air systems secretariat and the Air Intelligence Surveillance Target Acquisition and Reconnaissance Group, and no information was located. In contrast the Commissioner notes that the MOD has managed to located details of the company involved in providing training to qualified personnel thus suggesting the adequacy of such searches. Furthermore, the Commissioner recognises the arms length relationship between the MOD and the companies in question given that such training was procured via an FMS agreement. The Commissioner is therefore persuaded that the MOD does not hold a list, or easily accessible details of, the companies involved in this training.
54. Nevertheless, as is clear from the MOD's submissions, it does hold some relevant information falling within the scope of this request, albeit in its view such information would – at best - only partially answer request and in any event even providing this information would exceed the appropriate cost limit.
55. Section 12(1) of the FOIA states that:

*'(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'*

56. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £600 for central government departments such as the MOD. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours.
57. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur in:
- determining whether it holds the information;
  - locating the information, or a document containing it;
  - retrieving the information, or a document containing it; and
  - extracting the information from a document containing it.
58. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be 'sensible, realistic and supported by cogent evidence'.<sup>5</sup>
59. The Commissioner acknowledges that the estimate provided by the MOD is far from a comprehensive one. However, she accepts the rationale behind the breadth of the searches that the MOD would need to undertake to locate any such information, ie across all areas of the organisation involved in Reaper operations, that such searches would have to take into account data going back 10 years and that such information would be held in a variety of different IT systems. The Commissioner is therefore persuaded that extracting any information which is relevant to this request is a complex and time consuming process, and one that is likely to take more than 24 hours.

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<sup>5</sup> <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf> - see paragraph 12

60. In summary, the Commissioner has therefore concluded that the MOD does hold *some* information falling within the scope of request 3(a), however she accepts that providing this information would exceed the appropriate cost limit at section 12(1) of FOIA.
61. The Commissioner's acknowledges that the complainant has raised concerns that the MOD's introduction of section 12(1) at the stage it has and moreover that the Commissioner would be prepared to consider its application. However, the Upper Tribunal in *McInerney v IC and Department for Education* [2015] UKUT 0047 (AAC), found that public authorities have the right to claim any exemption, including section 12, for the first time before the Commissioner and furthermore that the Commissioner does not have the discretion as to whether or not to consider a late claim. As this is an Upper Tribunal decision, it is a binding decision which the Commissioner must follow.

## Other matters

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62. FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's guidance explains that in most cases an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances. In this case the MOD took 102 working days to complete its internal review response. The MOD explained that this was due to the fact that as part of the review it was necessary to consult with subject matter experts who in this case are primarily serving military officers who are currently engaged in supporting and managing Reaper operations and were therefore not routinely available. The MOD also explained that due to the complex and sensitive nature of information related to the Reaper programme and taking into account the amount of information requested from complainant in the past on the subject, careful consideration had to be given to the information which is available in the public domain and how it could be used in conjunction with the specific information being requested in this case.
63. The Commissioner appreciates the points that the MOD has made in respect of the particular circumstances of this case. However, her guidance on this issue is clear and she would expect public authorities to ensure that this is adhered to.



## Right of appeal

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64. 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)

65. 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.
66. 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**

## **Annex**

The complainant identified the following PQs as part of his submissions to the Commissioner:

### **1) Lord Lee of Trafford, 1 October 2012**

(<https://publications.parliament.uk/pa/ld201213/ldhansrd/text/121008w0001.htm#1210011000150>)

To ask Her Majesty's Government how many drone pilots are currently qualified in the Royal Air Force; and how many are undergoing training.  
[HL2182]

### **8 Oct 2012: Column WA400 The Parliamentary Under-Secretary of State,**

**Ministry of Defence (Lord Astor of Hever):** There are currently 31 Royal Air Force personnel qualified to pilot the Reaper Remotely Piloted Aircraft (RPA). The Royal Air Force will train a further 16 RPA pilots between October 2012 and September 2013.

### **2) David Anderson, 11 June 2013**

([https://publications.parliament.uk/pa/cm201314/cmhansrd/cm130611/text/130611w0001.htm#130611w0001.htm\\_wqn62](https://publications.parliament.uk/pa/cm201314/cmhansrd/cm130611/text/130611w0001.htm#130611w0001.htm_wqn62))

**Mr Anderson:** To ask the Secretary of State for Defence how many qualified unmanned aerial vehicle pilots are currently employed by the Royal Air Force.  
[158752]

**Mr Robathan:** There are currently 36 Royal Air Force personnel qualified to pilot remotely piloted air systems.

### **3) Jim Cunningham, 9 December 2015**

(<https://www.parliament.uk/business/publications/written-questions-answersstatements/written-question/Commons/2015-12-09/19382/>)

Written question – 19382

Asked by Mr Jim Cunningham (Coventry South)

#### **Unmanned Air Vehicles 19382**

To ask the Secretary of State for Defence, how many remotely piloted aircraft system pilots are employed in the RAF; and if he will make a statement.

**Answered by: Penny Mordaunt**

**Answered on: 15 December 2015**

There are currently 40 Remotely Piloted Aircraft System pilots in the Royal

Reference: FS50789461

Air Force.