

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2022

Public Authority: Ministry of Defence

Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking information it held about the attack on the Dusit D2 complex that happened in January 2019 in Nairobi, Kenya. The MOD confirmed that it held information falling within the scope of the request but considered this to be exempt from disclosure on the basis of sections 26(1)(b) (defence), 27(1)(a) and (c) (international relations) and 40(2) (personal data) of FOIA.
2. The Commissioner's decision is that the MOD is entitled to withhold the information on the basis of sections 26(1)(b), 27(1)(a) and 27(1)(c).
3. No steps are required.

Request and response

4. The complainant submitted the following request to the MOD on 3 February 2021:

'I am looking for documents and internal correspondence relating to an attack that took place Dusit D2 complex that happened on the 15th-16th January 2019 in Nairobi, Kenya. I understand that a member of the British military was at the scene assisting the local security forces. I would like the material relating to this assistance.'

5. The MOD responded on 3 March 2021 and confirmed that it held some information falling within the scope of the request but it was seeking to withhold this on the basis of sections 26 (defence) and 27 (international relations) of FOIA. The MOD also explained that it 'neither confirms nor denies any information under absolute exemption section 23(5) [security bodies] is held in scope of this request.'
6. The complainant contacted the MOD on 4 March 2021 and asked it to conduct an internal review of this refusal.
7. The MOD informed him of the outcome of the review on 14 July 2021. The review explained that the information was being withheld on the basis of sections 26(1)(b), 27(1)(a) and (c) of FOIA. The MOD explained that information which would reveal the identify of current or former members of the armed forces was exempt from disclosure on the basis of section 40(2) of FOIA. The MOD also explained that in light of the findings in relation to the other exemptions, the application of section 23(5) had not been considered as part of the internal review.

Scope of the case

8. The complainant contacted the Commissioner on 25 July 2021 in order to complain about the MOD's decision to withhold information falling within the scope of his request. The Commissioner has focused on the exemptions cited in the internal review response and therefore has not considered the MOD's initial citing of section 23(5). The complainant's submissions to support his complaint are set out below.

Reasons for decision

Section 26(1)(b) - defence

9. 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.'

10. 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.
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, confirmation or denial 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

The complainant's position

11. The complainant argued that it has been made clear by media reporting briefings by the Kenyan authorities, and other security services, that the MOD assistance was requested to deal with the attack and that this was given. In light of this, he argued that sections 26 and 27 of FOIA would not apply to any information already in the public domain.
12. The complainant also explained that it was his understanding that a report was produced by a person attending the scene who was not part of any government, security service or military body. The complainant explained that this individual took it upon themselves to interview various participants before giving this document to local journalists and British embassy officials responsible for MOD affairs. He argued that in his view such information would not be caught by the exemptions cited by the MOD.
13. The complainant also explained that 'Local Private Military Contractors' had confirmed to him that debriefing reports were produced which were passed to the MOD for comment and approval. He argued that given the general distribution of these documents with the media, sections 26 and 27 of FOIA should not apply.
14. The complainant suggested that a lot of the information he had referred to (and no doubt more) will be appearing in a book about the attack, 'One Man In' by Chris Craighead. The complainant suggested that as this book could only have been written after MOD approval was granted, holding back any relevant documents falling within the scope of his request makes it appear that one cannot ask the government but buy the book to find out more information about the attack. He argued that

this goes against general FOI principles of open government that information be purchased rather than requested.

The MOD's position

15. The MOD argued that releasing information concerning UK military assistance in Kenya would (as opposed to only being likely to) prejudice the effectiveness or security of any relevant forces. More specifically, the MOD explained that disclosure of the information in the scope of the request would reveal specific details on rules of engagement, capabilities or operational constraints and limitations placed upon UK forces. In the MOD's view disclosure of such information would therefore assist hostile forces in building up a detailed picture of the techniques, tactics and procedures used by the two nations in response to a particular mode of attack. The MOD argued that such insight would assist those with hostile intent to develop countermeasures and strategies, which would place British forces and their allies at more risk than they otherwise might be, as well as undermining the delivery of current and future missions and tasks, including peace keeping operations.
16. The MOD also provided the Commissioner with some additional arguments to support its reliance on section 26(1)(b), which referenced the content of the withheld information itself, and therefore are not included in this notice.
17. With regard to the complainant's grounds of complaint, in respect of the book he referred to, the MOD explained that this had not been authorised by the MOD. In respect of the particular document referred to by the complainant at paragraph 12 the MOD advised the Commissioner that despite thorough searches, this particular document had not been located. The MOD explained that it was aware of the media articles relating to the incident but remained of the view that disclosure of the withheld information would be prejudicial for the reasons outlined above and for the reasons set out in its further submissions to the Commissioner.

The Commissioner's position

18. In terms of the first criterion set out above, 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.
19. With regard to the second and third criteria, having considered the content of the withheld information Commissioner is satisfied that disclosure of the information would, as the MOD has argued, reveal specific details of the UK forces rules of engagement as well as capabilities or operational constraints and limitations placed upon them. The Commissioner is also satisfied that disclosure of the withheld

information would provide those with a hostile intent and insight into the techniques, tactics and procedures used by the two nations in response to a particular mode of attack. As result the Commissioner is satisfied that there is a causal relationship between disclosure of the information and the prejudice section 26(1)(b) is designed to protect. It is also clear that any such prejudice would be real and of substance. Furthermore, the Commissioner is satisfied that the likelihood of prejudice occurring is clearly one that is more than hypothetical; rather he is satisfied that given the content of the withheld information, and the detailed operational information it contains, disclosure of it would prejudice the capability, effectiveness or security of UK forces.

20. In reaching this conclusion, the Commissioner has taken into account the information already in the public domain about this incident. However, in the Commissioner's opinion the information contained in the withheld information goes beyond the details already in the public domain and disclosure of it would be prejudicial for the reasons outlined above. The Commissioner also notes that proposed book identified by the complainant was not authorised by the MOD and therefore in his view it cannot be argued that disclosure of any information in the book represents an official disclosure by the UK government, or constitutes a disclosure of information that was sanctioned by it.

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.
22. The MOD acknowledged that release of information withheld on the basis of section 26(1)(b) would demonstrate that the MOD's commitment to the general obligations of openness and transparency. Furthermore the MOD acknowledged that disclosure would provide the public with an insight into the extent and nature of the conduct of British armed forces and its interaction with allied forces, and overseas operations.
23. However, the MOD argued that it was clearly against the public interest to disclose information that would place British, and allied, armed forces at greater risk when operating on current and future missions.
24. The Commissioner appreciates that the incident in question attracted significant public interest and media reporting. The Commissioner also acknowledges that there is a genuine public interest in the disclosure of information that would provide an insight into the conduct of British forces on missions abroad and disclosure of the information withheld on the basis of this exemption would directly meet this aim. However, the

Commissioner agrees with the MOD that there is particularly strong public interest in ensuring that the effectiveness and security of UK armed forces is not harmed. In the circumstances of this case the Commissioner considers that this public interest attracts particular weight given the content of the withheld information and the impact disclosure could have on both current and future operations.

25. The Commissioner has therefore concluded that the balance of the public interest favours maintaining the exemption contained at section 26(1)(b) of FOIA.

Section 27 – international relations

26. The MOD also argued that parts of the withheld information were exempt from disclosure on the basis of sections 27(1)(a) and (c) which state that:

'(1) 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...

...(c) the interests of the United Kingdom abroad.'

27. Section 27(1) is a prejudice based exemption and therefore the criteria at paragraph 10 above must be met in order for it to be engaged.

The MOD's position

28. The MOD argued that the effective conduct of international relations depends on the maintenance of trust and confidence between governments. In its view if this trust was damaged, the UK would be less able to protect and promote UK interests through international relations. In relation to the particular circumstances of this case, the MOD argued that disclosure of information detailing the UK's engagement with the Kenyan forces, and potentially revealing their armed forces strategies, could damage these relationships and would reduce the UK government's ability to protect and promote UK interests abroad. The MOD argued that the level of prejudice in relation to these exemptions was set at the lower level of 'would be likely'.

The complainant's position

29. In support of his view that sections 27(1)(a) and (c) would not apply to all of the information, the complainant cited the submissions summarised above at paragraphs 11 to 14.

The Commissioner's position

30. With regard to the criteria at paragraph 10, the Commissioner is satisfied that the first criterion is met as the prejudice envisaged by the MOD is clearly one that is protected by the exemption contained at section 27(1)(a) of FOIA. The Commissioner is also satisfied that there is a causal relationship between the disclosure of the withheld information and prejudice to the UK's relations with Kenya given the expectation that such information would be treated confidentially and not placed into the public domain. The second criterion is therefore met. In light of this expectation and having taken into account the content of the information, the Commissioner is satisfied that there is more than a hypothetical risk of prejudice occurring. The third criterion is therefore met and the Commissioner accepts that disclosure of the information would be likely to harm the UK's relations with Kenya, and in turn, would be likely to harm UK interests abroad in the context of that relationship.
31. Again, in reaching this conclusion, the Commissioner has taken into account the complainant's submissions above. However, for similar reasons to his findings in relation to the applicability of section 26(1)(b), the Commissioner is satisfied these do not undermine the MOD's application of sections 27(1)(a) and (c).

Public interest test

32. Section 27 is also 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 sections 27(1)(a) and (c) outweighs the public interest in disclosing the information.
33. The MOD acknowledged that disclosure of the information withheld on the basis of these exemptions would also demonstrate its commitment to openness and transparency. In addition, the MOD accepted that there was a general interest in the deployment of UK armed forces personnel and how they act in the defence or support of other nations. However, the MOD argued that it would be firmly against the public interest to disclose information which harmed the UK's international relations and harmed the UK's interests abroad.
34. For the reasons set out above, the Commissioner agrees that there is considerable public interest in the disclosure of information falling within the scope of this request. However, the Commissioner agrees with the MOD that it would be clearly against the public interest for the UK's relations with an ally to be harmed. Given this, and the underlying importance of maintaining trust between allied armed forces, the Commissioner has concluded that the public interest favours maintaining the exemption.

Reference: IC-120122-T0Z3



35. In light of the above findings the Commissioner has not considered the MOD's reliance on section 40(2) of FOIA.

Right of appeal

36. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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
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