

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

### **Decision notice**

**Date:** 10 February 2023

**Public Authority:** 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 a list of editions of 'JSP 398 - UK Rules of Engagement' and a copy of the latest edition. The MOD provided him with a list of editions and a redacted copy of the latest edition. It explained that the redactions had been made on the basis of sections 23(1) (security bodies), 24(1) (national security) and 26(1)(a) and (b) (defence) of FOIA.
2. The Commissioner's decision is that the MOD can rely on section 23(1) or sections 26(1)(a) and (b) to withhold the redacted information. The only exception to this conclusion is in respect of the redaction contained at paragraph 33, page 8 of Part 2 of JSP 398; the Commissioner does not accept that this redaction is exempt from disclosure on the basis of sections 26(1)(a) and (b) of FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - Provide the complainant with an unredacted copy of the paragraph 33, page 8 of Part 2 of JSP 398.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

## Request and response

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5. The complainant submitted the following request to the MOD on 18 March 2021:  
  
`Please provide the following information
  1. A dated list of editions of JSP 398 and any changing document titles.
  2. A copy of the extant edition of JSP 398.<sup>1</sup>
6. The MOD provided him with a substantive response to his request on 10 August 2021.<sup>2</sup> The MOD provided a dated list of editions of JSP 398 but explained that the current edition was exempt from disclosure on the basis of section 26(1)(b) (defence) of FOIA.
7. The complainant contacted the MOD on 2 September 2021 and challenged its decision to withhold the current edition of JSP 398.
8. The MOD informed him of the outcome of the internal review on 13 May 2022. The MOD explained that the list of editions of JSP 398 previously provided was incomplete and it therefore provided him with a revised list. With regard to the current version of the JSP 398, the MOD confirmed that this was exempt from disclosure on the basis of sections 26(1)(b) of FOIA and also section 26(1)(a). Furthermore, the MOD explained that sections 23(1) (security bodies) and 24(1) (national security) applied to parts of the document. Finally, the MOD noted that sections 27 (international relations), 38 (health and safety) and 40(2) (personal data) also provided a basis to withhold parts of the document but these had not been considered further in the review given the application of the previously cited exemptions.

## Scope of the case

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9. The complainant contacted the Commissioner on 16 May 2022 to complain about the MOD's decision to withhold the current edition of JSP
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<sup>1</sup> JSP 398 is the United Kingdom Manual of National Rules of Engagement.

<sup>2</sup> This followed a decision notice issued by the Commissioner on 19 July 2021 ordering the MOD to respond to the request and finding it in breach of section 10(1) of FOIA for failing to do so within 20 working days. <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2620316/ic-110765-p2p9.pdf>

398. He was also unhappy with the length of time took the MOD to complete the internal review.

10. During the course of the Commissioner's investigation of this complaint the MOD provided the complainant with a redacted version of JSP 398 on 30 September 2022.
11. Following this disclosure, the complainant confirmed to the Commissioner that he wished to challenge the MOD's decision to withhold the redacted information (the only exception being the redaction of telephone numbers which he accepted). This decision notice therefore considers whether such information is exempt from disclosure under FOIA.

## **Reasons for decision**

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### **Section 23(1) – security bodies**

12. The MOD has redacted parts of JSP 398 on the basis of section 23(1) of FOIA. This states that:

'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'

13. The MOD explained that the Rule of Engagement (ROE) set out in JSP 398 are applicable to all serving members of UK armed forces, including special forces.
14. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3).<sup>3</sup> This means that if the requested information falls within this class it is absolutely exempt from disclosure under FOIA. There is no requirement on the public authority to demonstrate that disclosure of the requested information would result in some sort of harm.
15. The Commissioner has examined the information which the MOD has sought to withhold on the basis of section 23(1) of FOIA and he is

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<sup>3</sup> A full list of the bodies detailed in section 23(3) is available here:

<https://www.legislation.gov.uk/ukpga/2000/36/section/23>

satisfied that it was either supplied by, or relates to, the security bodies listed in section 23(3) of FOIA. Such information is therefore exempt from disclosure on the basis of section 23(1) of FOIA. The Commissioner cannot elaborate on this finding without revealing the content of the information which has been withheld on the basis of this exemption.

16. Section 23(1) is an absolute exemption which means that it is not subject to the public interest test.

### **Section 26 - defence**

17. The MOD argued that the remaining parts of JSP 398 which had been redacted were exempt from disclosure on the basis of sections 26(1)(a) and (b) of FOIA.

18. These state that:

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

(a) the defence of the British Islands or of any colony, or

(b) the capability, effectiveness or security of any relevant forces.'

19. In order for a prejudice based exemption, such as section 26, to be engaged the Commissioner believes that three criteria must be met:

20. 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.

21. 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.

22. 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 MOD's position

23. The MOD explained that JSP 398 contains the ROE that UK forces apply in every defence situation. Disclosure of the entirety of JSP 398 would therefore reveal the likely reactions of UK armed forces in any given scenario. The MOD argued that in view of this it is appropriate to not only apply section 26(1)(b) to the withheld information but also to apply section 26(1)(a) because of the implications for the RAF's system of Quick reaction Alert capability if the JSP was released in full.
24. The MOD argued that disclosure of the withheld information would reveal information that was of use to the UK's adversaries and provide them with an opportunity to gain an understanding about the rules used and allow them to alter their tactics, techniques and procedure such that it would increase the risk to UK armed forces and our allies in operations. The MOD argued that level of prejudice was set at 'would' rather than 'would be likely'.
25. The MOD provided the Commissioner with additional submissions to support its reliance on section 26 but as these were provided in confidence they have not been included in this notice.

#### The complainant's position

26. The complainant's submissions to the Commissioner primarily focused on public interest in disclosure of the withheld information. However, he also provided the Commissioner with submissions, broken down by the specific redactions made to the copy of JSP 398 that was disclosed to him, in relation to his view that exemptions contained at section 26(1) were not engaged. For the purposes of this decision notice the Commissioner has not included each individual point made by the complainant to challenge the MOD's engagement of section 26(1).<sup>4</sup> Rather, by way of summary, the thrust of the complainant's main argument was that as JSP 398 was not a document specific to a particular operation no prejudice was likely to arise from its disclosure.

#### The Commissioner's position

27. With regard to the first criterion, the Commissioner accepts that the type of harm that the MOD believes would occur if the withheld

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<sup>4</sup> Despite the approach taken in this notice the Commissioner wishes to emphasise he has carefully considered each individual submission made by the complainant.

information was disclosed is applicable to the interests protected by sections 26(1)(a) and (b) of FOIA.

28. With regard to the second criterion, having considered the submissions provided to him by the MOD and the content of the redated information, the Commissioner is satisfied that disclosure of this clearly has the potential to harm the capability, effectiveness or security of UK forces. This is on the basis that, as the MOD has argued, disclosure of the information would reveal in detail the ROE which UK forces follow and awareness of these would allow adversaries to alter their tactics, techniques and procedures. Furthermore, in turn, the Commissioner considers there to be a causal link between disclosure of the withheld information and the interests which sections 26(1)(a) and (b) are designed to protect for the reasons set out by the MOD.
29. With regard 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 adopting their approaches to and engagement with UK forces to the detriment of the latter. The Commissioner also agrees with the MOD that the higher threshold of would prejudice is met.
30. In reaching this finding the Commissioner appreciates the complainant's point that as JSP 398 was not a document specific to a particular operation, no prejudice was likely to arise from its disclosure. It is of course correct to say that the document is not specific to one particular operation. However, in the Commissioner's view the fact that it applies to all operations conducted by UK forces increases, rather than decreases, the risk of prejudice occurring if the redacted information was disclosed.
31. There is one exception to the Commissioner's findings as set out above. This relates to the redaction made to paragraph 33, page 8 of Part 2 of JSP 398. In the Commissioner's view it is not sustainable for the MOD to argue that there is causal link between disclosure of this particular information and prejudice occurring to defence interests. The Commissioner has elaborated on this finding in a brief confidential annex which will be sent to the MOD only. This is necessary so as not to undermine the MOD's application of the exemptions.

### **Public interest test**

32. 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 exemptions contained at sections 26(1)(a) and (b) outweigh the public interest in disclosing the information.

Public interest in maintaining the exemptions

33. The MOD argued that there was a very significant public interest in protecting the ability and security of the UK armed forces and in turn the ability of such forces to defend the British Isles. In the MOD's views the weight attributed to such interests far outweighed any public interest in disclosure of the withheld information.

Public interest in disclosure of the information

34. The MOD acknowledged that disclosure of information about the UK's ROE policy would provide the public with assurances of the degree of care taken by the MOD in the conduct of military operations. Furthermore, the MOD acknowledged that disclosure would also add weight to the MOD's position that it acts in accordance with International Humanitarian Law.
35. The complainant provided the Commissioner with detailed submissions, broken down by reference to the individual redactions made by the MOD, to support his view that the public interest favoured disclosure of the redacted information. The Commissioner has not reproduced all of the complainant's submissions here; rather he has simply included the complainant's overarching public interest submissions. However, as with the complainant's submissions on the engagement of section 26, the Commissioner wishes to emphasise that he has given careful consideration to each and every submission made by the complainant alongside the content of a particular redaction.
36. The complainant argued that the public interest weighs overwhelmingly in favour of release of an unredacted version of JSP 398. In support of this he made the points:
37. The complainant argued that the redefinition of 'Hostile Act' and 'Hostile Intent' in the ROE was evident from the comparisons with the publicly available 2000 edition of JSP 398. He suggested that this redefinition widened the parameters in which lethal force is now open to being authorised for use by UK forces, even against targets that do not threaten to attack. The complainant noted that the JSP 398 declares that the ROE are consistent with domestic and international law, but in its present redacted form, he argued that this was just a bare assertion. Rather, in order to ascertain whether the ROE complies with law, full

disclosure of the rules themselves is very clearly in the public interest and is proportionate and necessary in a democratic society.

38. More specifically, the complainant argued that the definition of the term 'hostile act' has been redefined from one that once required an attack of some kind to be imminent, to one now not constituting an actual attack. He argued that a 'hostile act' is now one that is considered 'intentional' in causing serious prejudice to, or poses a serious danger to UK armed forces or coalition forces or designated persons and/or designated property, but does not go as far as constituting an armed attack. He suggested that the judgement of these intentions or dangers has no apparent independent scrutiny and is instead made by ministerial decree or secret intelligence assessment. Further the complainant argued that clarification is needed on this point, if the public is to be assured that UK forces are acting within the parameters of the rule of law.
39. The complainant argued that if UK ROE can permit the giving of orders to use force against targets that need only be suspected of 'intent' to cause serious prejudice or danger, then even within the established humanitarian principles of proportionality and distinction, this potentially provides ministerial approval for state-sponsored assassinations and murders of political actors who simply exercise their fundamental freedom of expression of political views.
40. The complainant suggested that while it can be understood that this lowering of the threshold for use of force is part of a wider response by western democracies to the particular threat posed by terrorists in the wake of the of the 9/11 criminal attacks on the USA, it does not solve the problem of criminal terrorist violence, but rather adds to it. The complainant suggested that when there is no imminent threat of military attack, the mechanisms by which a democratic society can tackle criminal terrorist conspiracies are well established. An independent police investigation, on the basis of reasonable suspicion to a lawful arrest of suspects by police officers using evidence that can be put before a court, provides it. However, he argued that such processes did not apply to extra-judicial killing or assassination. In light of this disclosure, there is now an urgent need for greater transparency as to the permitted limits of use of force by UK forces.

#### Balance of the public interest

41. The Commissioner recognises that there is a clear and legitimate public interest in the disclosure of information regarding the ROE to which UK armed forces are subject to. Disclosure of the withheld information would provide the public with further insight into how military operations are conducted under the ROE and this could, as both parties suggest, provide an insight how such ROE comply with International



Humanitarian Law. The Commissioner is also cognisant of the significance of the ROE and the fact that they cover all UK military operations and actions. Furthermore, taking into account the points made by the complainant, he appreciates the seriousness of the matters to which the ROE relate and the fundamental questions that arise from them. The Commissioner therefore accepts that there is strong public interest in disclosure of an unredacted copy of JSP 398.

42. However, the Commissioner agrees with the MOD that it would be fundamentally against the public interest to disclose information that would undermine the effectiveness and security of the UK armed forces, and in doing so, undermine their ability to protect the British Isles and UK interests from hostile forces. In the circumstances of this case the Commissioner considers that such arguments attract additional weight given that the ROE apply to all military operations and thus the prejudicial consequences of disclosure are wide ranging. The Commissioner also considers that the disclosure of a redacted version of JSP 398 goes some way to meeting the public interest in favour of disclosure.
43. In view of the above, the Commissioner has concluded that the public interest favours maintaining sections 26(1)(a) and (b).
44. As the Commissioner has concluded that all of the redacted information is exempt from disclosure on the basis of section 23(1) or sections 26(1)(a) and (b) of FOIA he has not considered the MOD's reliance on section 24(1) in this notice.

## **Other matters**

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45. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice<sup>5</sup> explains that such reviews should be completed within a reasonable timeframe. The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.<sup>6</sup>

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<sup>5</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

<sup>6</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

46. In this case the complainant requested an internal review on 2 September 2021 and the MOD issued its response on 13 May 2022. The Commissioner wishes to take the opportunity to remind the MOD of the importance of ensuring that internal reviews are conducted in a timely manner.

## Right of appeal

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47. 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](mailto:grc@justice.gov.uk)

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

48. 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.
49. 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**  
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