

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

### **Decision notice**

**Date:** 30 March 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 information about a particular Reaper drone strike attack on an individual described as a "known terrorist" in Syria in October 2021. The MOD provided a small amount of information falling within the scope of the request but explained that the remaining information was exempt from disclosure on the basis of sections 23(1) (security bodies) or 24(1) (national security), section 26(1)(b) (defence), section 27(1)(a) (international relations) and section 42(1) (legal professional privilege) of FOIA.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of sections 26(1)(b) and 27(1)(a) of FOIA and that public interest favours maintaining each exemption.
3. No steps are required.

#### **Request and response**

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4. The complainant submitted the following request to the MOD on 11 January 2022:

'According to the UK government website a Reaper drone strike attacked an individual described as a "known terrorist" in Ras al Ayn, Syria on 25 October 2021. "Monday 25 October 2021 The crew of a remotely piloted Reaper, armed with Hellfire missiles, tracked a known terrorist in northern Syria, near the city of Ras al Ayn, and at a safe moment, when the individual was alone in a field, carried out a successful attack."

With regard to the above event please provide the following information

1. All audio-visual records of the above attack, including related pre-strike and post attack audio visual records for the 24 hour period of 25 October 2021.
2. Targeting folders and records identifying the individual attacked and the evidential basis for the claim they were a "known terrorist".
3. Rules of Engagement (ROE) for the operation and any records of military command and ministerial approval of any such ROE.
4. Legal justification and guidance for the specific attack.
5. Records of collateral damage assessments, both before and after attack.'
5. The MOD contacted the complainant on 7 February 2022 and confirmed that it held information falling within the scope of this request but it considered sections 26 (defence) and 27 (international relations) of FOIA to apply and explained that it needed additional time to consider the balance of the public interest test.
6. The MOD provided the complainant with a substantive response to his request on 10 March 2022. With regard to question 4 the MOD explained that 'The UK's legal basis for military action in Syria is the collective self-defence of Iraq against Daesh in accordance with the UN Charter. All military operations are conducted in accordance with the UK's obligations under international law and the law of armed conflict.'
7. However, the MOD explained that with regard to the remaining information it held falling within the scope of the request:
  - 'a. Some of the information you have requested under 1, 2, 3 & 5, falls within the scope of the exemption provided for at Section 24(1) (National Security).

- b. Some of the information you have requested under questions 1 – 5 falls within the scope of the exemption provided for at Section 26(1)(b) (Defence)
  - c. Some of the information you have requested under 1, 2, 4 & 5, falls within the scope of the exemption provided for at Section 27(1) (International Relations).
  - d. Some of the information you have requested under question 4 falls within scope of the exemption provided for at Section 42(1) (Legal Professional Privilege)'
8. The MOD explained that it had concluded that the balance of the public interest test favoured maintaining each of the qualified exemptions. However, it noted that section 17(4) of FOIA was considered to apply and therefore it could not provide a full explanation as why it had reached this conclusion.<sup>1</sup>
9. The complainant contacted the MOD on 6 April 2022 and asked it to conduct an internal review of this refusal. The MOD informed him of the outcome of the review on 24 June 2022. The review contained additional explanations as to why each of the exemptions had been applied, but again noted that due to section 17(4), it was unable to provide the complainant with full details as to why it had concluded that the public interest favoured withholding the information.<sup>2</sup>

## Scope of the case

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10. The complainant contacted the Commissioner on 8 August 2022 in order to complain about the MOD's refusal of his request. He questioned the
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<sup>1</sup> Section 17(4) of FOIA states that a public authority does not have to explain why an exemption applies in its refusal notice if to do so would involve the disclosure of exempt information.

<sup>2</sup> During the course of the Commissioner's investigation the MOD advised that rather than rely on section 24(1) on its own, it now sought to rely on section 23(1) (security bodies) and section 24(1) in the alternative.

Citing the sections 23(1) and 24(1) of FOIA in the alternative means that although only one exemption is engaged the other one is also cited so as to disguise which exemption is in fact being relied upon.

Further information on this point is contained in the Commissioner's guidance <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/how-sections-23-and-24-interact/#text4>

engagement of the exemptions and argued that the public interest favoured disclosure of all the information falling within the scope of his request.

## Reasons for decision

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### Section 26(1)(b) - defence

11. Section 26(1)(b) of FOIA states that:

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

... (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.
- 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

13. The MOD argued that release of the information withheld on the basis of this exemption would reveal the tactics, techniques and procedures (TTPs), including rules of engagement, and capabilities being used in current air strike operations, and it is likely that similar approaches would be used in future operations. Indeed, the MOD explained that the information in scope remains operationally sensitive at a time when the

UK Armed Forces and coalition allies are continuing to take the fight to Daesh in Iraq and Syria.<sup>3</sup>

14. More specifically, the MOD argued that if released, the information could be used by hostile forces to gain insight into the specific circumstances under which the Reaper platform is tasked to deploy. Such information could in turn be used by such forces to develop countermeasures or change behaviours in a way that could prejudice the capability and effectiveness of the Reaper platform for the UK and its allies. As a result the MOD argued that release would prejudice the security of UK personnel and the UK's allies by providing tactical and operational advantage to any enemies. The MOD confirmed that it considered the exemption at section 26(1)(b) of FOIA to engaged at the higher level of 'would' rather than 'would be likely to'.

#### The complainant's position

15. The complainant argued that UK defence would not be prejudiced by the release of the requested information. In support of this position the complainant noted that audio-visual records of military drone strikes, including in Afghanistan and Syria, have been voluminously released into the public domain without prejudice to the defence of the countries that have done so. The complainant cited videos released by the US, Turkey, Azerbaijan and Ukraine.

#### The Commissioner's position

16. 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.
17. Furthermore, having considered the content of the withheld information the Commissioner is satisfied that its disclosure would, as the MOD have argued, reveal specific operational details including TTPs used in air strike operations. The Commissioner is also satisfied that those with hostile intent could use such information to gain insights into the use of Reaper and in turn develop countermeasures or alter their behaviour in a way that would prejudice the capability and effectiveness of the Reaper platform. In addition, the Commissioner accepts that such a risk is relevant to both current and future operations.

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<sup>3</sup> <https://www.gov.uk/government/news/update-air-strikes-against-daesh>

18. In light of this the Commissioner is satisfied that the likelihood of prejudice occurring is one that is more than a hypothetical risk; the second and third criteria are therefore met and the exemption is engaged. The Commissioner is also satisfied that the MOD were correct to argue that the risk of such prejudice occurring is set at the higher level of 'would'.
19. In reaching this finding the Commissioner accepts that other states have released footage from military drone strikes. However, in the Commissioner's view this does not set a precedent or approach that the UK could or should follow. Moreover, in the context of FOI requests, it is important to remember that the applicability of exemptions will depend on the particular circumstances of each request. For the reasons set out above the Commissioner is satisfied that disclosure of the withheld information would harm UK defence interests and he does not consider the availability of the information referred to by the complainant to undermine this position.

### **Public interest test**

20. 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 disclosing the information

21. The complainant argued that in his view the public interest favoured full disclosure of all of the information falling within the scope of his request. In support of this position the complainant cited a report by the organisation Syrians for Truth and Justice (STJ) into the circumstances of the strike which was the focus of his request.<sup>4</sup> The complainant noted that the publication of the report drew concern from human rights non-governmental organisations (NGOs) and some parliamentarians about the strike, and more specifically, concerns in respect of information not included in the MOD statement about it.<sup>5</sup> Given the STJ report, the complainant argued that there were legitimate questions about the legal framework for the strike. Furthermore he argued that the report also

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<sup>4</sup> <https://stj-sy.org/en/syria-a-jihadist-and-an-arms-dealer-killed-in-global-coalition-drone-strikes/>

<sup>5</sup> <https://www.middleeasteye.net/news/syria-uk-accused-reviving-targeted-killing-policy-islamic-state>

raised questions about the reliability of MOD's reports of actions and post strike assessments of civilian harm. He argued that such questions could only be addressed by the release of the information sought by his request.

22. The MOD acknowledged that the arguments in favour of release include a potential increase in the public's understanding of the operations which the UK's Armed Forces conduct, and that releasing such information would make the UK Government more accountable to the public. Release would also provide public reassurance that effort is made to minimise civilian casualties and would provide public confidence in the conduct of Reaper air strikes. In addition, release would provide further public assurance that the rules of engagement are properly considered, carefully managed and proportionate in relation to the measures deployed by the UK to ensure its national security from any potential overseas threat. The MOD also acknowledged that it would also add weight to its position that it acts in accordance with International Humanitarian Law.

#### Public interest in maintaining the exemption

23. The MOD argued that it was firmly against the public interest to disclose information that would prejudice the capability and effectiveness of the Reaper platform for the UK and its allies. This is because it would not be in the public interest as it would increase the risk not only to UK forces and those that the UK operates alongside but could also indirectly increase the risk to the civilian population.

#### Balance of the public interest arguments

24. The Commissioner appreciates the serious nature of the incident which is the focus of this request. Consequently, the Commissioner accepts that there is a significant public interest in the disclosure of information which would inform the public about this incident. Furthermore, the Commissioner acknowledges that the report cited by the complainant has led to questions being raised by both NGOs and parliamentarians as to the circumstances of the incident and the MOD's reporting of it. The Commissioner accepts that such factors add further weight to the public interest arguments in favour of disclosing the information. In the Commissioner's view disclosure of the information would go a considerable way to meeting these public interests.
25. However, the Commissioner agrees with the MOD that there is a very significant public interest in ensuring that the capability, effectiveness or security of UK armed forces are not harmed. In the Commissioner's view the fact that disclosure of the information would prejudice both current and future operations of this nature adds, in his view, further and

ultimately compelling, weight to the public interest in favour of maintaining the exemption.

26. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining the exemption.

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

27. The MOD also relied on section 27(1)(a) which states 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'

28. Section 27(1) is a prejudice based exemption and therefore the criteria at paragraph 12 above must be met in order for it to be engaged.

#### The MOD's position

29. The MOD argued that the effective conduct of international relations depends on the maintenance of trust and confidence between governments. If this trust was damaged, the UK would be less able to protect and promote UK interests through international relations. The MOD explained that there is a general understanding that information relating to military or security activities conducted under partnership are handled in a confidential and secure manner. Therefore, any loss of trust between the UK Government and international partners, or any other allied or partner nation, would negatively impact upon the UK's ability to work with them closely on current and future shared defence and security objectives, such as Counter Terrorism and regional stability.
30. The MOD argued that disclosure of information falling within the scope of this request would harm relations between the UK and other states. This is because disclosure could inhibit the willingness of the other nations to participate or share information that may assist with the fight against global terrorism in the future. In addition, the MOD argued that disclosure could result in unwillingness to share intelligence or data may also impact on current and future operations. The MOD confirmed that it considered the exemption at section 27(1)(a) of FOIA to engaged at the higher level of 'would' rather than 'would be likely to'.

#### The complainant's position

31. The complainant argued that disclosure of the withheld information would not prejudice international relations as it would clarify the status of the victims and whether or not they were lawful targets for lethal force. In the complainant's view this could only promote the adherence

to international standards of humanitarian and human rights law. The complainant suggested that it was already reported that Turkish forces took part in the operation to some extent and that the Global Coalition against Daesh is led by the US.

### The Commissioner's position

32. With regard to the criteria at paragraph 12, 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 partners and allies given the expectation that information about such operations are expected to be treated confidentially. The second criterion is therefore met. Furthermore, having taken into account the content of the information, and the ongoing nature of operations against Daesh, the Commissioner is satisfied that there is more than a hypothetical risk of prejudice occurring. The third criterion is therefore met. The Commissioner is also satisfied that the MOD were correct to argue that the risk of such prejudice occurring is set at the higher level of 'would'.
33. The Commissioner is not persuaded that the complainant's submissions in respect of this exemption undermine this finding.

### **Public interest test**

34. 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 section 27(1)(a) outweighs the public interest in disclosing the information.

### Public interest in disclosing the information

35. As noted above, the complainant argued that in his view the public interest favoured disclosure of all of the information falling within the scope of the request. In the context of this exemption, he emphasised that there is a greater public interest in allowing the public to properly understand the full details of the strike rather than 'shielding from accountability [the] US, British and/or Turkish forces in this case'.
36. For its part, the MOD acknowledged that the release of the information to which this exemption was applied would demonstrate the MOD's commitment to the Government's openness and transparency agenda, making the Government more accountable to the public, and to the international community. It is also accepted that there is a general interest in the deployment of UK Armed Forces personnel and how they conduct operations with the support of other nations.

Public interest in maintaining the exemption

37. The MOD argued that it would be firmly against the public interest for the UK's relations with its international partners to be undermined as this would negatively impact upon the UK's ability to work closely together on current and future shared security objectives, such as Counter Terrorism and regional stability.

Balance of the public interest arguments

38. As noted above, the Commissioner accepts that there is considerable public interest in the disclosure of the withheld information. In the context of section 27, disclosure could provide the public with some insight into how the UK conducts operations with forces from other states.

39. However, the Commissioner agrees with the MOD that it would be clearly against the public interest for the UK's relations with its allies in the context of such operations to be harmed. This is especially the case given that such operations were ongoing at the time of the request. In light of this, and given the underlying importance of maintaining trust between allied armed forces, the Commissioner has concluded that the public interest favours maintaining the exemption.

40. As the Commissioner is satisfied that all of the withheld information is exempt from disclosure on the sections 26(1)(b) and 27(1)(a) he has not gone on to consider the other exemptions cited by the MOD in this notice.

## Right of appeal

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41. 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)

42. 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.
43. 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**  
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**Wilmslow**  
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