

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

### **Decision notice**

**Date:** 18 October 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 firstly statistics about Reaper and Typhoon missions, and secondly information about an investigation regarding a particular Reaper strike. In response to the first element of the request the MOD disclosed some information but sought to withhold the remainder on the basis of section 23(1) (security bodies), or in the alternative, section 24(1) (national security), section 26(1)(b) (defence) and sections 27(1)(a) and (c) (international relations) of FOIA. In response to the second element of the request, the MOD disclosed some information but withheld additional information on the basis of section 23(1), or in the alternative, section 24(1), and section 26(1)(b).
2. The Commissioner's decision is that the information sought by questions 1b) to 4, and the additional information falling within the scope of question 6, is exempt from disclosure on the basis of section 23(1) or section 24(1) of FOIA.
3. The Commissioner does not require further steps.

## Request and response

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4. The complainant submitted the following request to the MOD on 3 January 2023:

"Please can I ask under the Freedom of Information Act:

1) For each month between October 2022 and December 2022 and broken down between

i) Reaper and ii) Typhoon

a) the total number of missions undertaken by these aircraft on Operation Shader;

b) the number of those missions entering Syria;

c) the number of those missions entering Iraq?

2) For each month between October 2022 and December 2022, the number of sorties with weapons released by a) Reaper and b) Typhoon broken down between Iraq and Syria?

3) For each month between October 2022 and December 2022, the number and type of weapons released by a) Reapers and b) Typhoons broken down between Iraq and Syria?

4) The number of UK weapon release events in a) Iraq and b) Syria per month from October 2022 to December 2022, broken down between Reaper and Typhoon?

5) Please can you tell me, for each month between October 2022 and December 2022, how many hours have UK a) Reaper and b) Typhoon flown on Operation Shader?

6) Please can you confirm if the RAF opened an investigation into local reports of civilian casualties from the RAF Reaper strike on Al Bab, northern Syria on December 20th? If so, please can you let me know the results of the investigation or whether the investigation is on-going."

5. The MOD responded on 9 February 2023 and provided the information sought by questions 1a and 5. With regard to the remainder of the information, the MOD explained that this was being withheld on the basis of sections 24 (national security), 26 (defence) and 27 (international relations) of FOIA.

6. The complainant contacted the MOD on the same day and asked it to conduct an internal review of the decision to withhold this information. He noted that the statistical information requested had been provided to him on a quarterly basis since 2015 without any suggestion that disclosure of this information would be prejudicial.
7. The MOD informed him of the outcome of the internal review on 23 June 2023. The MOD revised its position and explained that in relation to questions 1(b) to 4 of the request it now sought to rely on section 23(1) (security bodies) and section 24(1) in the alternative.<sup>1</sup> The MOD explained that it remained of the view that the information sought by these questions was also exempt from disclosure on the basis of sections 26(1)(b) and 27(1)(a) and (c). With regard to question 6 of the request, the MOD explained that the initial response had 'inadvertently engaged the above exemptions [ie the exemptions applied to parts 1(b) to 4 of the request in the refusal notice] of the Act to this part of the request, however, the intention was to instead neither confirm nor deny (NCND) whether any information is held by the Department'. The MOD went on to explain that it was refusing to confirm or deny whether it held information falling within the scope of question 6 on the basis of sections 23(5) and 24(2) of FOIA. The MOD noted that its explanation for why these exemptions were considered to apply was brief because of the provision at section 17(4) of FOIA.<sup>2</sup>
8. The MOD contacted the complainant on 20 September 2023 and further revised its position regarding question 6. It explained that it was now content to confirm under section 1 of FOIA that information in the scope of this part of the request was held. It confirmed that the MOD did carry out an investigation, however under section 23(1) or section 24(1) (applied in the alternative) and section 26(1)(b), the MOD withheld information which would reveal whether the investigation was carried out by the RAF. With regard to the second element of part 6 of the request which was 'please can you let me know the results of the investigation or whether the investigation is on-going', the MOD

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<sup>1</sup> 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. This approach may be necessary in instances where citing one exemption would in itself be harmful. Further information on this issue is contained in the Commissioner's guidance <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/how-sections-23-and-24-interact/#text4>

<sup>2</sup> Section 17(4) provides that a public authority does not have to explain in a refusal notice why an exemption applies if to do so would involve the disclosure of information that is itself exempt.

confirmed that the result of the investigation confirmed that there were no civilian casualties and that the investigation was closed.

## **Scope of the case**

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9. The complainant initially contacted the Commissioner on 5 May 2023 in order to complain about the MOD's decision to withhold information falling within the scope of his request, as well as its failure to complete the internal review.
10. Following the completion of the internal review, the complainant confirmed that he remained dissatisfied with the MOD's decision to withhold information falling within the scope of his request.

## **Reasons for decision**

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### **Questions 1b to 4**

#### **Section 23(1) – information supplied by or relating to bodies dealing with security matters**

#### **Section 24 – national security**

11. Section 23(1) of FOIA provides an exemption which 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).”

12. 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>

13. Section 24(1) states that:

“Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security”.

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<sup>3</sup> A list of the bodies included in section 23(3) of FOIA is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

14. FOIA does not define the term 'national security'. However in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:
- 'national security' means the security of the United Kingdom and its people;
  - the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
  - the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
  - action against a foreign state may be capable indirectly of affecting the security of the UK; and,
  - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
15. Furthermore, in this context the Commissioner interprets 'required for the purpose of' to mean 'reasonably necessary'. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate.
16. As is clear from the wording of section 24(1), the exemptions provided by sections 23(1) and 24(1) are mutually exclusive. This means they cannot be applied to the same request.
17. However, the Commissioner recognises that the fact that section 24(1) can only be applied to information that is not protected by section 23(1) can present a problem if a public authority does not want to reveal whether or not a section 23 security body is involved in an issue. To overcome this problem, as referred to above at footnote 1, the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice.
18. As the Commissioner's guidance on this issue explains, a decision notice which upholds the public authority's position will not allude to which exemption has actually been engaged. It will simply say that the Commissioner is satisfied that one of the two exemptions cited is engaged and that, if the exemption is section 24(1), the public interest

favours withholding the information. The approach of applying these exemptions in the alternative has been accepted by the Upper Tribunal.<sup>4</sup>

### The complainant's position

19. In his submissions to the Commissioner the complainant emphasised that he has previously requested the data sought in multiple times going back at least to 2014 and this information had always been provided. He emphasised that the information being requested was basic statistical data. He also noted that the MOD had not, in his view, offered any explanation as to why it had changed its approach to requests for such data.

### The MOD's position

20. In its internal review response, the MOD explained that the release of information to which section 24(1) may be engaged would promote accountability and transparency of national security matters. However, it argued that such a release would also provide those with hostile intent valuable insight into the techniques, tactics and procedures which are employed to help protect the UK's national security.

21. The MOD added that the release of any information (when paired with information already available in the public domain) would provide adversaries with an insight into the UK Armed Forces tactic, techniques and procedures used in operations, and the capabilities of UK Armed Forces to deliver them and could have the unfortunate effect of assisting them to develop countermeasures to undermine or negate the effect of UK operations. This would place similar future operations at risk, prejudicing the Armed Forces' capability and effectiveness and, in turn, their ability to safeguard national security and protect the UK's interest at home and around the world.

22. The MOD argued that clearly any release of information that would prejudice the ability of UK Armed Forces to protect national security cannot be in the wider public interest. It concluded that whilst it could not confirm whether it was seeking to rely on section 23(1) or section 24(1), to the extent that section 24(1) might be engaged, taking into

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<sup>4</sup> Foreign, Commonwealth and Development Office v Information Commissioner, Williams & Others, [2021] UKUT 248 (AAC) <https://www.gov.uk/administrative-appeals-tribunal-decisions/foreign-commonwealth-and-development-office-v-information-commissioner-williams-and-others-sections-23-and-24-2021-ukut-248-aac>

account the factors above, it had concluded that the balance of public interest is in favour of withholding the information.

23. In addition, the MOD provided the Commissioner with detailed confidential submissions to support its approach of citing sections 23(1) and 24(1) in the alternative.

#### The Commissioner's position

24. Based on submissions provided to him by the MOD during the course of his investigation, the Commissioner is satisfied that the information sought by questions 1b) to 4 of the request either falls within the scope of the exemption provided by section 23(1) of FOIA or falls within the scope of the exemption provided by section 24(1) of FOIA, and that if the exemption engaged is section 24(1) then the public interest favours maintaining the exemption.
25. The Commissioner cannot elaborate on his rationale behind this finding without compromising the content of the withheld information itself or by revealing which of these two exemptions is actually engaged. The Commissioner appreciates that this is likely to prove frustrating to the complainant. However, the Commissioner would like to emphasise that he has carefully scrutinised the MOD's submissions and that in doing so he has taken into account the complainant's position that such information has been previously disclosed.
26. In light of the above findings the Commissioner has not considered the MOD's reliance on sections 26(1)(b) and 27(1)(a) and (c) of FOIA.

### **Question 6**

#### The MOD's position

27. In its response to the complainant of 20 September 2023, the MOD explained that release of information to which section 24(1) may be engaged, ie whether the investigation was carried out by the RAF, would promote accountability and transparency of national security matters and would help inform debate relating to overseas military operations that may result in fatalities, which are of course of high public interest. However, the MOD argued that Reaper is a sensitive UK national security asset, and it is in the public interest to protect information that would reveal how and why it is employed to support the delivery of national security objectives.
28. Again, the MOD emphasised that any release of information that would prejudice the ability to protect national security cannot be in the wider public interest. Therefore, whilst it could again not confirm whether section 23(1) or section 24(1) was engaged, to the extent that section

24(1) might be engaged, taking into account the factors above, the MOD had concluded that the balance of public interest is in favour of withholding the information.

29. In addition, the MOD provided the Commissioner with further confidential submissions to support its reliance on sections 23(1) and 24(1) in the alternative.

The Commissioner's position

30. Based on submissions provided to him by the MOD during the course of his investigation, the Commissioner is satisfied that the remaining information in the scope of question 6 either falls within the scope of the exemption provided by section 23(1) of FOIA or falls within the scope of the exemption provided by section 24(1) of FOIA, and that if the exemption engaged is section 24(1) then the public interest favours maintaining the exemption.
31. Again, the Commissioner cannot elaborate on his rationale behind this finding without compromising the content of the withheld information itself or by revealing which of these two exemptions is actually engaged. However, the Commissioner would like to emphasise that he has carefully scrutinised the MOD's submissions before reaching this conclusion.
32. In light of the above findings the Commissioner has not considered the MOD's reliance on section 26(1)(b) of FOIA.



## Other Matters

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33. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.<sup>5</sup> 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> In this case the MOD took 92 working days to complete the internal review.

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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/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

## Right of appeal

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34. 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)

35. 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.
36. 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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**Information Commissioner's Office**  
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