

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 March 2024

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a multipart request to the Ministry of Defence (MOD) seeking information about a UK drone strike in Syria in 2015 which killed three individuals, two of whom were UK nationals. The MOD confirmed that it held information falling within the scope of the request but refused to disclose this on the basis of range of exemptions, namely section 23(1) or section 24(1) cited in the alternative for parts 1-3 of the request, section 23(1) for parts 4a) to c) of the request; and sections 26 (defence), 27 (international relations), 35(1)(a) (formulation or development of government policy), 35(1)(c) (Law officers' advice) and 42 (legal professional privilege) of FOIA for various parts of the request.
2. The Commissioner's decision is that the information in scope of parts 1 to 3 of the request is exempt from disclosure on the basis of section 23(1) or section 24(1) of FOIA, and that the information in the scope of parts 4a) to c) of the request is exempt from disclosure on the basis of section 23(1) of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted the following request to the MOD on 29 March 2023:

"According to a report published by the UK Parliamentary Intelligence and Security Committee in 2017

"On 21 August 2015, a UK drone targeted and killed Reyaad Khan, a UK national, in the Raqqah area of Syria. Two other individuals, both described as ISIL associates, were also killed (one of whom, Ruhul Amin, was also a UK national)."

"The Prime Minister said:

I can inform the House that in an act of self-defence and after meticulous planning, Reyaad Khan was killed in a precision airstrike carried out on 21 August by an RAF remotely piloted aircraft while he was travelling in a vehicle in the area of Raqqa in Syria. In addition to Reyaad Khan, who was the target of the strike, two ISIL associates were also killed, one of whom, Ruhul Amin, has been identified as a UK national. They were ISIL fighters, and I can confirm there were no civilian casualties. "

Please provide the follow information related UK drone strike of 21 August 2015 referred to above:

1. All audio-visual records held for the 21 August 2015 strike for the period of twelve hours before and after the strike, including records from geospatial, UAV, guided weapon cameras and sensors, and on the ground target designators and sensors
2. All records of pre- strike Collateral Damage Estimates and post-strike Damage Assessments and civilian casualty assessments and reports for this strike. The numbers of permitted potential civilian casualties and the level of authorisation fror [sic] the strike.
3. Full operational Rules of Engagement, details of weapons used, and Targeting Directives produced for this strike before and after it was carried out.
4. All records of communications between UK government officials and military officers between 14 August 2015 and September 30th 2015, concerning:

a, the fact that this was a new departure or novel use of UK force outside of a battlefield, and the legal justification for use of lethal force was considered as "self-defence".

b, the fact that this was a strike targeting a suspected member of a non-state armed group, and UK national.

c, the fact that definitions in UK ROE "42 series" in 2013 UK National ROE permitted offensive lethal force to be used against individuals considered to be demonstrating 'Hostile Intent' where there was no known threat of imminent armed attack."

5. The MOD responded to the request on 5 May 2023 and refused to comply with it on the basis of section 12(1) (cost limit) of FOIA. It provided advice and assistance so that the complainant could submit a refined request.

6. He did so on 5 May 2023 and submitting the following request:

"Following your advice on how to confine the request to within cost limits I wish to narrow down Part 4 of the request from

"4. All records of communications between UK government officials and military officers between 14 August 2015 and September 30th 2015, concerning: a, the fact that this was a new departure or novel use of UK force outside of a battlefield, and the legal justification for use of lethal force was considered as "self-defence". b, the fact that this was a strike targeting a suspected member of a non-state armed group, and UK national. c, the fact that definitions in UK ROE "42 series" in 2013 UK National ROE permitted offensive lethal force to be used against individuals considered to be demonstrating 'Hostile Intent' where there was no known threat of imminent armed attack."

to

4. All briefings and meeting minutes between MOD, and the Cabinet Office, and/or the Prime Minister's Office, and/or the Attorney General's Office, between 14 August 2015 and September 30th 2015, concerning:

a, the fact that this was a new departure or novel use of UK force outside of a battlefield, and the legal justification for use of lethal force was considered as "self-defence".

b, the fact that this was a strike targeting a suspected member of a non-state armed group, and UK national.

c, the fact that definitions and/or rules in UK National ROE, can permit offensive lethal force to be used against individuals in cases of "Hostile Acts" where a deliberate act does not constitute an actual attack, but causes serious prejudice to, or poses a serious danger to UK Armed Forces or designated persons and/or designated property, or where in cases of "Hostile Intent" there is no imminent attack or threat to life, but there exists a likely and identifiable threat of danger to UK Armed Forces or designated persons and / or designated property, recognisable on the basis of both the capability and preparedness of individuals, groups of personnel or units to inflict damage, and intelligence which indicates an intention to attack or otherwise inflict damage. (Note 1.)

(Note 1.) To assist the MOD, the definitions referred to in Part 4.c, can be found in part 2 of the 2019 edition of UK ROE published here:

<https://www.whatdotheyknow.com/request/7...>"

7. The MOD responded to the request on 4 August 2023. The response can be summarised as follows¹:
 - a. All of the information in scope of parts 1-3, and some of the information in scope of parts 4a-c, is exempt under section 26(1) (defence).
 - b. All of the information in scope of parts 1-3 may also be exempt under section 23(1) (security bodies) or section 24(1) (national security), with these exemptions being cited in the alternative.²
 - c. For part 2 of the request, the MOD noted that the then Prime Minister made a statement in Parliament on 7 September 2015 about the strike in question. That statement, publicly available, confirmed that there were no civilian casualties in the strike.

¹ The wording of this summary is based on the summary of the refusal notice contained in the MOD's internal review of 10 November 2023.

² 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/freedom-of-information-and-environmental-information-regulations/how-sections-23-and-24-interact/#text4>

- d. Some of the information requested for all parts of the request is exempt from disclosure under section 27(1) (international relations).
 - e. All of the information in scope of parts 4a-c is exempt from disclosure under the absolute exemption at section 23(1) (security bodies).
 - f. Some of the information requested for parts 4a-c is also exempt under 35(1)(a) (formulation or development of government policy) and 35(1)(c) (Law officers' advice) and section 42 (legal professional privilege).
8. The complainant contacted the MOD on 4 August 2023. He challenged the MOD's position that the exemptions applied, and argued that even if they did, in his view the public interest favoured disclosure of the information.
9. The MOD informed him of the outcome of the internal review on 10 November 2023. The review upheld the application of the exemptions as set out in the refusal notice. It noted that in line with section 17(4) of FOIA further details as to why the exemptions applied could not be provided.³

Scope of the case

10. The complainant contacted the Commissioner on 9 October 2023 in order to complain about the MOD's decision to withhold the information falling within the scope of his request.

Reasons for decision

Parts 1, 2 and 3 of the request

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:
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³ 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.

“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).⁴

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”.

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

⁴ 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>

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 2, 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.⁵

The complainant's position

19. Both the complainant's request for an internal review, and his submissions to the Commissioner, provided detailed arguments to support his challenge to the exemptions cited by the MOD. The Commissioner does not intend to set out these arguments in detail here, but has summarised them as follows:
20. Disclosure of the requested material would not allow terrorists to adapt their methods given the significant amount of information already in the public domain about how Reaper drone strikes are operated, including camera footage from previous strikes.

⁵ 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>

21. No two drone strikes are the same and therefore disclosure of information about one strike does not risk harming future operations.
22. In any event, there is a compelling public interest in the disclosure of the requested information. This position is supported by the lack of clarity regarding the legal framework for such actions and the failure of government to cooperate with parliamentary investigations into such strikes. Furthermore, the complainant argued that protecting national security includes the safeguarding of the democratic system and the rights and freedoms of the UK public to question and hold to account the state for actions such of those which are the subject of this request.

The MOD's position

23. The MOD explained that it was relying on section 23(1) and 24(1), in the alternative, to withhold information falling within the scope of parts 1 to 3 of the request. It explained that to the extent that information may be exempt under section 24(1), this could be because it could contain details about sensitive military and national security capabilities, which, if made public, could prejudice their effectiveness. The MOD argued that this could hinder the ability of the UK government to conduct counter-terrorism operations, which could put the UK and its citizens at risk and would therefore not be in the public interest. The MOD explained that as counter-terrorism operations in Syria and Iraq specifically are ongoing, the risk of prejudicing future operations could be a real one.

The Commissioner's position

24. Based on submissions provided to him by the MOD during the course of his investigation, including sight of the withheld information, the Commissioner is satisfied that the information sought by parts 1 to 3 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.
26. In light of the above findings the Commissioner has not considered the MOD's reliance on the other exemptions cited to withhold information falling within the scope of parts 1 to 3 of the request.

Parts 4a), b) and c) of the request

27. The MOD argued all of the information in scope of parts 4a) to c) of the request was exempt from disclosure on the basis of section 23(1) of FOIA.
28. Paragraphs 11 and 12 above set out what this exemption provides for and how the Commissioner interprets this provision of FOIA.
29. Based on the submissions provided to him by the MOD, including sight of the withheld information, the Commissioner is satisfied that the information falling within the scope of parts 4a) to c) is exempt from disclosure on the basis of section 23(1) of FOIA. The Commissioner cannot elaborate on this finding in the decision notice without revealing details about the content of the withheld information itself.
30. In light of this finding the Commissioner has not considered the MOD's reliance on the other exemptions cited to withhold information falling within the scope of parts 4a) to c) of the request.

Right of appeal

31. 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

32. 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.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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