



Neutral citation number: [2024] UKFTT 35 (GRC)

Case Reference: EA/2020/0125

**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

**Heard at: Field House, London
Heard on: 17-18 May 2021
Decision given on: 16 January 2024**

Before

**JUDGE LYNN GRIFFIN
JUDGE CLARE GOODMAN**

Between

CERI GIBBONS

and

**THE INFORMATION COMMISSIONER
MINISTRY OF DEFENCE**

Appellant

Respondent(s)

Representation:

For the Appellant: Julianne Morrison

For the First Respondent: did not attend and was not represented

For the Second Respondent: Julian Blake

Decision: The appeal is Dismissed

REASONS

1. Mr Ceri Gibbons, the Appellant, is seeking disclosure under the Freedom of Information Act 2000 (FOIA) of a document from the Ministry of Defence (MOD). The document he requests be disclosed is the Joint Service Publication (JSP) 900 (II

edition, September 2015) – UK Defence Full Spectrum Targeting Policy. The Appellant’s particular area of interest is the use of unmanned aerial vehicles (“UAVs”, sometimes known as “drones”) but the document he seeks is not confined to UAV (or other remote targeted) strikes, and sets out the targeting policy adopted by the United Kingdom in military operations.

2. Sections of the requested information have been disclosed to the Appellant by the MOD but there remain redactions within the document which, with the exception of redactions made under section 40 FOIA, remain in dispute. We shall refer to this as the “withheld information”. The Appellant continues to seek disclosure of the remainder of the withheld information because of his concerns as to whether the targeting policy complies, not only with international law, but also UK domestic criminal law; he is concerned about the alleged possibility that ‘unlawful attacks’ are executed by the United States of America from UK bases.

The request

3. The Appellant made a request for information under FOIA to the MOD on 15 October 2018. That request was for a copy of JSP900: UK Targeting Policy (edition II, September 2015) – UK Defence Full Spectrum Targeting Policy. We shall refer to the document as JSP900.
4. The MOD responded to the request on 1 February 2019 and confirmed that it held the requested information but considered the document to be exempt from disclosure on the basis of section 26 FOIA which is concerned with defence. The Appellant did not agree that the information was exempt and so contacted the MOD on 20 March 2019 to ask for an internal review of the refusal. The MOD informed him of the outcome of the internal review on 5 June 2019. That review concluded that the requested information was exempt from disclosure on the basis of sections 26(1)(b), 24(1) (national security) and 27(1)(a) and (b) (international relations) FOIA.
5. The Appellant made a complaint to the Information Commissioner’s office. During the course of the investigation of the complaint, the MOD contacted the Appellant on 29 October 2019 and provided him with a redacted version of the document he had requested. At this point the MOD confirmed that it considered the redacted material to be exempt from disclosure on the basis of the exemptions cited in the internal review and that, in addition, section 23 (security bodies) applied to some of the information.

The Information Commissioner’s decision

6. On 26 February 2020 the Information Commissioner (the Commissioner) issued her decision under reference FS50838374. This is the decision under appeal.

7. The Commissioner concluded that the remaining withheld information is exempt from disclosure on the basis of sections 26(1)(b), 23(1) and 40(2) FOIA. However, the Commissioner also concluded that the MOD breached section 10(1) and section 17(1) FOIA in the manner in which it handled this request. The Commissioner did not require any steps to be taken.
8. The Commissioner found that section 26 was engaged for all the withheld information, and was satisfied that disclosure *would* prejudice the interests set out in the section. The Commissioner decided that the public interest fell in favour of maintenance of the exemption, albeit by a relatively narrow margin. The Commissioner recognised that “there is a clear and indisputable public interest in the disclosure of the UK’s targeting policy” but that the disclosure made of the redacted version of JSP900 had partially met that public interest. The Commissioner recognised that there was also a “very strong” public interest in the defence of the UK and its armed forces especially where the information requested related to the targeting policy of all military operations.
9. The Commissioner further found that the absolute exemption provided by section 23 FOIA was engaged in relation to some of the withheld information which was either supplied by, or related to, security bodies.
10. As to the application of section 40 the Commissioner decided that the MoD had properly relied upon section 40(2) FOIA to withhold the contact telephone number of a MoD employee. This was not an issue in the appeal.
11. Given the conclusions the Commissioner came to on section 26, it was not necessary for her to consider sections 24(1) or 27(1) FOIA.

The appeal

12. Mr Gibbons appealed to the Tribunal against the Commissioner’s decision notice. In summary, the grounds of appeal are that, contrary to the Commissioner’s decision:
 - a. section 26 FOIA is not engaged or, alternatively, if the exemption is engaged, the public interest balance favours disclosure; and
 - b. section 23 FOIA is not engaged.
13. The Commissioner maintains the position as set out in the decision notice.
14. The MOD’s case is that the withheld information is properly withheld under s.23 (security bodies) and s.26 (defence) FOIA. The MOD also relies on s.27 (international relations) FOIA to the extent that such reliance may be necessary.

The hearing

15. The hearing took place in person on 17 and 18 May 2021. I apologise to the parties for the time it has taken to reduce our decision to writing and for it to be promulgated.
16. Part of the hearing was held in closed session, from which the Appellant was excluded. This is a procedure regularly adopted in this Tribunal to facilitate the consideration of the withheld information. Before the closed session the Appellant was given an opportunity to set out those matters which he would like the Tribunal to explore in that closed session and afterwards was provided with a gist of what had happened. This was in order that he had as much information as possible about the matters raised in the closed session.
17. There is no closed annex to accompany this decision, we are of the view that our reasons can be adequately explained without provision of a closed annex. It is important that the Tribunal's reasons are made public, albeit without disclosing the content of the withheld information which is the subject of our decision.

The evidence

18. The Tribunal received an open bundle that contained 3686 pages including indices.
19. Within the open bundle we received a number of documents from the Appellant that originated from the US and NATO or described targeting policies including,
 - a. NATO Standard AJP-3.9 Allied Joint Doctrine for Joint Targeting, Edition A Version 1 NATO 1 April 2016;
 - b. Target Development Standards US Joint Chiefs of Staff 6 May 2016;
 - c. Ministry of Defence, 'Collection, Allied Joint Publication (AJP),' published 16 May 2013, last updated 10 July 2020;
 - d. Ministry of Defence, 'Allied Joint Publication-5 Allied Joint Doctrine for the Planning of Operations,' NATO Standard AJP-5 Edition A Version 2, UK Change 1, May 2019;
 - e. Ministry of Defence, 'Allied Joint Publication-3.9 Allied Joint Doctrine for Joint Targeting,' NATO Standard AJP-3.9 Edition A Version 1 April 2016;
 - f. US Departments of the Army, Navy and Airforce, 'Joint Publication 3-60, Joint Targeting,' 31 January 2013;
 - g. NATO Joint Targeting Doctrine AJP-3.9;
 - h. US DOD, 'Law of War Manual,' December 2016; Section 5.12.3.4 Enemy Use of Human Shields and Section 5.16 'Prohibition on using Protected Persons and Objects to shield, favour or impede military operations'.
20. In addition further documents were handed up by the Appellant during the course of the hearing:

- a. NATO Allied Command Operations – Comprehensive Operations Planning Directive COPD Interim V2.0 – 4 October 2013, unclassified;
 - b. United States Chairman of the Joint Chiefs of Staff Instruction, 12 October 2012;
 - c. United States Chairman of the Joint Chiefs of Staff Instruction, corrected copy 13 February 2009;
 - d. United States Central Command USCENTCOM supplement to the CJCSI 3160.01A No-strike and the Collateral Damage Estimation methodology. Unclassified 25 March 2014.
21. In addition to the documentary evidence we received detailed written submissions from all parties and copies of authorities relied upon for which we are grateful.
22. We also had the advantage of hearing oral evidence from three witnesses. The Appellant and the Appellant’s witness (Ms Jennifer Gibson) and a witness for the MOD who not only gave evidence in open session but also in closed.
23. The witness for the MOD is known as Witness MOD-A having been granted anonymity by the Tribunal Registrar pursuant to rule 14 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.
24. The Appellant confirmed the contents of his witness statement and was asked questions on behalf of the MOD and by the Tribunal. He said he was against unlawful military action but he recognised that if there was a need for self-defence there may be a need to use military action depending on the circumstances. He accepted that the information ought not to be disclosed should there be a risk to any person that would be caused by the release of the information. It was his view that the public interest in disclosure would not be lessened even if the withheld information supported the view that any action taken was in accordance with international law because the material had been requested for many years and there remained debate about the departure from standard practices by the US and the UK.
25. The Appellant was concerned that the UK was following the US down a “slippery slope” toward derogation from standards. He had formed this view based on reports he had read, for example from the All-Party Parliamentary Group (APPG) on Drones and responses to enquiries made by Members of Parliament and non-governmental organisations. He had gathered a vast amount of literature in which concerns were expressed about this issue: we were provided with examples of such material as exhibits to his witness statement and that of Ms Gibson. The Appellant stated that even if the withheld information did not support his view, it should be disclosed because it comprised legal guidance. He recognised that if the withheld information did not support his view, the public interest in disclosure may be of less weight than if it did support his view.

26. The Appellant acknowledged that he was not an expert in international law and therefore he was not in a position to assess the extent to which there was any divergence from international law but in his opinion the material should be released to allow public scrutiny, on the basis of the strength of the public interest in transparency. He said there were questions that needed to be answered.
27. Ms Gibson is the Lead for Extrajudicial Killings at Reprieve, an international non-governmental human rights organisation. In relation to her first witness statement Ms Gibson clarified certain matters in relation to the availability of documents in the public domain. Having confirmed the contents of her second witness statement she was asked questions on behalf of the MOD and by the Tribunal. Her key concern was that the UK had become “complicit” in unlawful operations, such as torture, where exceptions are made to the ordinary position. She said that where guidance and policy allow for exceptions to be made it is important to see the entire document without redactions.
28. Ms Gibson said that the request was not seeking operational details and that JSP900 was a high level policy document setting out best practice which goes to the heart of how international law is applied by the UK. In her view the UK’s practice in this regard was diverging from international law. She said the use of drones is subject to specific approvals. Ms Gibson suggested that where there are US personnel embedded within UK drone operations (in order to use UK drones) this is an indication that the operations may not comply with UK law. In her view there was “overwhelming” evidence that the UK was “caught up” in unlawful operations with the US and disclosure of the withheld information would enable the public to see the guidance and the details that allow the complicity to happen. Her interest was in finding “loopholes” within the documents that would permit a divergence from international law.
29. To an extent Ms Gibson disagreed with the Appellant, because in her view there was no need for the withheld information to explicitly set out exceptions or loopholes for the public interest to fall in favour of disclosure. For example, if the document included the words “may need”, this indicates that something (e.g. permission) may be needed but also that it may not be needed. Disclosure of the document would allow an assessment of whether international law was being complied with.
30. Ms Gibson explained her view that the fact of disclosure of other documents by the US and NATO, such as the documents listed at paragraph 19 and 20 above, tends in favour of disclosure of the withheld information because those documents were higher in the hierarchy of such information and their disclosure would jeopardise defence more than the release of JSP900.
31. Ms Gibson provided a bundle of exhibits that includes at E3127 a copy of a letter from the Chair of the APPG on Drones with an attachment setting out in detail the

APPG's concerns, *inter alia*, that the need for parliamentary scrutiny of executive action in a democracy is being undermined by the refusal to disclose JSP900 in its entirety. The APPG said that Parliamentarians had been calling for disclosure of JSP900 since at least 2013 and that in its view the public interest in disclosure outweighed any risk to "the UK's partnerships and operational integrity". According to the APPG, in the US transparency around targeting policy has resulted in policy improvements.

32. Witness MOD-A confirmed the contents of his witness statement in open session and clarified that the redaction of the first paragraph had been removed allowing him to explain his role in open evidence. He was Assistant Head of Military Strategic Effects and had been with the MOD for over 20 years. He develops guidance about the process of targeting which is signed off by the MOD. The guidance he develops is intended to bridge the gap between the lawyers and the military.
33. The witness was asked questions in open session on behalf of the Appellant. Witness MOD-A clarified which decisions he had been involved in relating to the release of information.
34. Witness MOD-A was asked about other documents in the public domain, such as the NATO Joint Targeting Doctrine and others listed at paragraph 19 and 20 above. He said that although the US had published some documents in this sphere in the past, they were no longer publicly available. Furthermore, JSP900 is not a "doctrine" publication and thus it is different to the NATO and US doctrine publications listed in paragraph 19 which are in the public domain. Nor is JSP900 a purely policy and guidance document; it also explains how to do things. This includes the specifics of tactics, techniques and procedures (TTPs) used by the military although it does not cover named targets or operations. The document covers both lethal and non-lethal operations giving specific details of how they should be conducted at a tactical level. It was not possible in his view to divorce the specifics from the process. Witness MOD-A could not say whether the release of US documentation had caused harm to the interests of the US because that would be a question for the US Department of Defence.
35. Witness MOD-A gave the JSP900 templates as an example of the possible harmful consequences of the disclosure of the withheld material. The withheld information details the operational TTPs which are used and followed by the UK armed forces in conducting targeting operations and these have not changed significantly over successive editions of the JSP, are currently in use on active operations, and are likely to be used in the future. JSP900 also outlines the targeting capabilities of the UK armed forces and contains a template for operational targeting directives. Whether harm would be caused by the release of the templates would depend on the information or processes covered within the template. He was aware of examples

where the release of information had caused harm and led to a change of process which he expanded upon in closed session.

36. Witness MOD-A was not able to confirm the provenance of the document titled United States Chairman of the Joint Chiefs of Staff Instruction, 12 October 2012 (one of the documents provided to us by the Appellant during the course of the hearing, see paragraph 20(b)) because as far as he was aware that document had not been intended for public release. In so far as the witness was aware it had not been voluntarily released by the US.
37. As to the other documents he was asked to comment upon, it was Witness MOD-A's view that the Appellant was trying to compare "apples and pears" and that worksheets used in training schools were different to the tables and proformas contained in JSP900. The context in which templates are used is an important consideration, a risk balance is always made but does not give away information or processes. There is no blanket rule for templates and it will depend on their context and contents. Disclosure of the templates in JSP900 would cause the armed forces to be put at risk. There was a danger in comparing documents of different origins especially when they concern the armed forces of different countries. JSP900 considers "the how" and not legal principles; it does not contain an evaluation of "why" steps might be taken. JSP900 clearly states that operations must be in accordance with international law.
38. Witness MOD-A accepted that there was a public interest in the release of JSP900 but he explained that in his view this had been addressed by the release of the unredacted parts of the document. Release of further information would cause harm because it concerns TTPs used by the military. He said that in his view release of the redacted portions of the document would effect the efficiency and capability of the armed forces.
39. In the view of Witness MOD-A the withheld information would not shed light on how the UK meets its legal obligations and did not contain any exceptions or deviations from the material that had already been released. The key principles had not been redacted. The reason the withheld information has not been released is to protect the armed forces. Witness MOD-A acknowledged the public interest in allowing debate on the issues, but said that release of the withheld information would put the armed forces at greater risk.
40. The Tribunal also heard from Witness MOD-A in closed session from which the Appellant was excluded. Before the closed session the Appellant provided a list of topic areas or questions that he invited the Tribunal to cover in the closed session. There were 15 questions/topics on the Appellant's list, some of which included subparagraphs; these were explored in the closed session. A gist of that closed

session was provided to the Appellant at its conclusion. The gist provided to the Appellant read as follows:

The witness was taken through all of the Appellant's questions. He was also taken through the specific references to JSP900 from the Appellant's schedule. In broad terms the evidence was:

1. *The US released information (or information in the public domain) and JSP900 are not identical. Whilst there is some overlap in themes the UK has transcribed the information in a way that complies with UK procedures and includes specifics on UKTTPs.*
2. *The US is aware of the CJCSI3160 documents identified by the Appellant but has nevertheless requested that the US information transcribed in JSP900 is redacted.*
3. *The witness made clear that the damage includes threat to life.*
4. *The witness gave an example of where small amounts of information being released has had a detrimental effect.*
5. *The current version of JSP900 contains some differences to the 2015 version but they are largely of style and introductory sections rather than of substance. The new introductory sections are based on information that is publicly available.*
6. *The s.23 information relates to security bodies that were identified by the witness. That information is not simply something of interest to those bodies.*
7. *The Tribunal was taken to the templates. These are not simply standardised forms but are substantive and detailed in their content.*

The Appellant's submissions

41. In summary, the grounds of appeal are that -
 - a. section 26 FOIA is not engaged because:
 - i. the version of JSP900 requested by the Appellant was not the current version of the policy at the time of the request;
 - ii. JSP900 is a general policy document as opposed to a tactical/operational document;
 - iii. the claim that disclosure of the withheld information would prejudice the capability, effectiveness or security of the armed forces is not made out in circumstances where equivalent documents are available in the public domain from the US and NATO.
 - b. If the Tribunal were to find that section 26 is engaged the Appellant submits that the public interest balance plainly favours disclosure. He submits that the Commissioner erred by concluding that: "... the public interest in maintaining the exemption attracts further weight because the policy relates to the targeting of all military operations thus further increasing the prejudicial risks of any such disclosure" (paragraph 39 of the decision notice). He submits that if the information is general to all operations, this is a factor which mitigates any risk rather than heightens it.
 - c. Section 23 FOIA may have been mis-applied given that the MOD only raised this exemption during the Commissioner's investigation. However, the Appellant does not dispute that if a security body is referred to specifically in

the withheld information such information would be captured by section 23 FOIA.

42. The Appellant does not dispute the application of section 40 FOIA to those pieces of personal data included in the withheld information.
43. In written submissions regarding the public interest in release of the information, the Appellant further submits that:
- a. the Commissioner failed to recognise the continued importance and relevance of JSP900 despite the fact it was no longer the version in force;
 - b. there is a clear public interest in disclosure of JSP900 in its entirety, if only to *“assure military personnel that they are not being mis-directed into a position of being complicit with murder or any other war crime, or - outside of armed conflict - are not engaging in violations of the ECHR article 2 right to life [or the ICCPR Article 6 right to life, to which the UK is a ratifying party]”*;
 - c. as parliamentary committees have asked for the information but have not been provided with it, the process of scrutiny and holding the government to account through those committees is hindered by the *“continued secrecy”* of the withheld information;
 - d. the UK government’s refusal to publish the JSP900 contrasts with the position of the US and NATO. The NATO Joint Targeting Doctrine is in the public domain and the US has made its own joint targeting policy public. He suggests that the withheld information should be disclosed to allow for public scrutiny, as it has been by the US and NATO.
44. In oral submissions in closing the Appellant addressed 5 topics which he headed as follows:
- a. The heart of the case and the public interest;
 - b. Engagement of s.23;
 - c. The approach to qualified exemptions;
 - d. Issues concerning the application of s.26 and s.27;
 - e. Key points on the balance of the public interests.
45. The Appellant submitted that the issue at the heart of the case was not the legal tests to be applied in military operations or for the use of drones. The heart of the case, as he saw it, was the need to see the procedures used in order to test whether they are compliant with international law. Release of the withheld information would enable debate. The Appellant referred us to the letter of support from the APPG on Drones dated 30/3/21 page E3127 and reminded us that the reason why the information is sought is in relation to issues of collateral damage, the use of human shields and supporting operations post-strike.

46. The Appellant said that the continued redaction of key passages was not in the public interest and identified the reasons underpinning that submission as follows:
- a. Any exceptions or divergences from international law would not necessarily be explicit but could be found in a detailed analysis of the entire document JSP900;
 - b. Documents subsequently released are not relevant to assessing the public interest at the time of the request and response to it and are not an adequate substitute for release of the withheld information from JSP900;
 - c. There is a compelling and overwhelming interest in release of the information to inform public debate.
47. As to his second point (whether the withheld information engaged section 23), the Appellant reminded us of the late reliance on this exemption by the MOD. He stated that the nature of the document was not about specific operations and just because the security services may have been involved did not mean the information engaged section 23. In this regard he relied on the case of Corderoy & (2) Ahmed v (1) Information Commissioner, (2) Attorney-General and (3) Cabinet Office [2017] UKUT 495 (AAC), (known as Corderoy).
48. The Appellant's third topic related to the qualified exemptions provided for in sections 26 and 27 FOIA. The Appellant asked us to be mindful that the exemptions had not been made absolute by Parliament. He submitted that he could not accept that the disclosure of all parts of the withheld information would lead to a threat to life and reminded us of the late reliance on the exemptions and that some information from JSP900 had been released. He asked the Tribunal to be mindful to identify the difference between that which had already been released and the withheld information.
49. On his fourth point (as regards sections 26 and 27 FOIA) the Appellant said that the risks described do not match what is known about the nature of the withheld information. He submitted that there is no evidence the release of US documents, such as such as the documents listed at paragraph 19 and 20 above, has caused harm. He asked the Tribunal to examine other documents that have been released into the public domain and question why JSP900 is different.
50. In relation to section 27 he asked the Tribunal to consider the actual situation in which documents have been released, and whether they had been released inadvertently or not. He was not able to make any submissions about the strength of US concern about release of the withheld information as he had not seen the closed material. He suggested that if the UK's processes were overlaid then the US may not have the final word in any event. He asked the Tribunal to look at All Party Parliamentary Group on Extraordinary Rendition (APPGER) v Information Commissioner and The Ministry of Defence [2011] UKUT 153 (AAC) (known as APPGER) for guidance as to our approach. The Appellant said that the Tribunal

should consider whether there was any real evidence that prejudice to international relations would arise given the information in the public domain from the US. There was a need to scrutinise such a claim.

51. The Appellant's fifth point concerned the application of the public interest balance to the withheld information should the Tribunal decide that either section 26 or 27 were engaged. The Appellant said the public interest in debate was vital and that JSP900 was a pivotal document concerning compliance with international law which should be part of the debate which could lead to positive change.

The submissions of the Commissioner

52. In final submissions which effectively replaced the response, and maintained the conclusion within the decision notice, the Commissioner submitted:
- a. The MOD were entitled to rely on additional or alternative exemptions, pursuant to the case of DEFRA v IC and Birkett [2012] PTSR 1299;
 - b. The Appellant's approach to the application of s.23 is too narrow in the light of the caselaw, such as Commissioner of Police of the Metropolis v Information Commissioner and Rosenbaum [2021] UKUT 5 (AAC) in that he only accepts that the s. 23 exception applies to direct references to a specific security body whereas it is clear from Rosenbaum that the language of s.23 is used in the widest sense when referring to information that "relates to" the security bodies;
 - c. The evidence demonstrates the harm that could be caused by the disclosure of the withheld information;
 - d. The Appellant's submissions about the likely content of the withheld material are not accurate in the light of the evidence from Witness MOD-A and the withheld information itself;
 - e. There are significant public interests on both sides of the debate and this is recognised in the decision notice;
 - f. If s.26 is engaged it carries with it an obvious public interest in the maintenance of the exemption but it is not an absolute exemption and there remains a public interest balance to be undertaken;
 - g. The importance of avoiding harm to the capability, effectiveness or security of UK and allied forces is obvious. The Commissioner's assessment is that the MoD has put forward a detailed and properly evidenced basis for its view (which the Commissioner accepts) that such prejudice would occur were the withheld information to be released. That is a significant matter for the Tribunal to take into account in the balance;
 - h. While the Commissioner accepts that there is a public interest in transparency and accountability, there is an element of circularity in the Appellant's secondary contention that even if the withheld information does not demonstrate that UK is acting in a manner incompatible with its international

obligations, it should be released in any event to facilitate public scrutiny and debate;

- i. It is highly material to take into account that there is very substantial information (in particular) about the approach taken to ensuring the lawfulness of UK military action already in the public domain, such information having been already disclosed by the UK armed forces including both the redacted JSP900 and the various other publications referred to by the Appellant and the MOD (see paragraphs 19 and 20 above). This information answers many of the Appellant's concerns;
- j. The withheld information is not of the same kind as that already disclosed. The fact that a different approach is being taken by the MOD is not indicative of an undisclosed reason for withholding the information but is explained as being due to the harm that would be caused by that disclosure.

The submissions of the MOD

53. In its response to the appeal and oral submissions, the MOD submitted in relation to sections 26 and 27 FOIA that there was a straightforward issue for the Tribunal about whether the withheld information would, or would be likely to, prejudice the capability, effectiveness or security of the armed forces or international relations. It was submitted that the evidence presented for the MOD had not been undermined and therefore bearing in mind the case law and the quality of evidence the MOD position should be accepted.
54. The MOD submitted that the public interest in disclosure was weaker than had been suggested in previous cases in which there had been a different focus. In this case it was submitted that Ms Gibson's evidence showed that the public interest relied upon in support of disclosure was founded on the possibility that there would be something in the withheld information in JSP900. The MOD submitted that this hope or possibility does not justify the damage that would be caused by the release of the withheld information.
55. The MOD went on to submit that debate about the use of drones or wider arguments can be held without disclosure of the withheld information. Disclosure was not necessary for continued and well-informed debate in this area, which is demonstrated by the volume of information in the public domain, and the public discussion about that information, referred to in this case. The public interest in disclosure is diminished by the information already in the public domain.
56. The MOD submitted that the principles set out in the case law must be contextualised in individual cases. Comparisons with other cases or documents should not be relied upon too heavily. In this case as much information as possible has now been released from JSP900 and only limited redactions remain withheld.

57. The MOD concluded by submitting that the release of the withheld information would lead to grave harm including not only diminishing trust in the UK by its allies but also a threat to life.
58. In relation to section 23 FOIA, the MOD submitted that as established in *Rosenbaum*, this exemption affords the widest protection of any of the exemptions and that where information had been withheld on the basis of section 23, there was no doubt that it was engaged.

The legal framework

59. Section 1(1) FOIA states

“Any person making a request for information to a public authority is entitled –
(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him.”

60. Section 23 FOIA creates an absolute exemption for the class of documents it covers. It provides as follows, so far as is relevant:

23 Information supplied by, or relating to, bodies dealing with security matters.

(1) 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).

...

3)The bodies referred to in subsections (1) and (2) are –

- (a)the Security Service,*
- (b)the Secret Intelligence Service,*
- (c)the Government Communications Headquarters,*
- (d)the special forces,*
- (e)the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,*
- (f)the Tribunal established under section 7 of the Interception of Communications Act 1985,*
- (g)the Tribunal established under section 5 of the Security Service Act 1989,*
- (h)the Tribunal established under section 9 of the Intelligence Services Act 1994,*
- (i)the Security Vetting Appeals Panel,*
- (j)the Security Commission,*
- (k)the National Criminal Intelligence Service,*
- (l)the Service Authority for the National Criminal Intelligence Service.*
- (m)the Serious Organised Crime Agency.*
- (n)the National Crime Agency.*
- (o)the Intelligence and Security Committee of Parliament.*

...

61. In *Commissioner of Police of the Metropolis v Information Commissioner and Rosenbaum* [2021] UKUT 5 (AAC), GIA/2230/2019, the Upper Tribunal approved and set out the following 14 principles drawn from the caselaw:

1. Section 23 affords the “widest protection” of any of the exemptions: *Cobain* at [19(b)] and [29].
2. The purpose of section 23 is to preserve the operational secrecy necessary for section 23(3) bodies to function: *Lownie* at [50].
3. It is “Parliament’s clear intention that, because of what they do, there should be no question of using FOIA to obtain information from or about the activities of section 23 bodies at all”. The exclusion of the section 23(3) bodies from the scope of FOIA was shutting the front door, and section 23 was “a means of shutting the back door to ensure that this exclusion was not circumvented”: *APPGER* at [16].
4. The legislative choice of Parliament was that “the exclusionary principle was so fundamental when considering information touching the specified bodies, that even perfectly harmless disclosure would only be made on the initiative or with the consent of the body concerned”: *Cobain* at [28]; *Lownie* at [53].
5. Asking whether the information requested is anodyne or revelatory fails to respect the difficulty of identifying what the revelatory nature of the information might be without a detailed understanding of the security context: *Lownie* at [42]; *Corderoy* at [59].
6. When applying the ‘relates to’ limb of sections 23(1) and (5), that language is used in “a wide sense”: *APPGER* at [25]; *Corderoy* at [59]; *Savic* at [40].
7. The first port of call should always be the statutory language without any judicial gloss: *APPGER* at [23]; *Corderoy* at [51]; *Savic* at [40].
8. With that warning in mind, in the context of ‘relates to’ in section 23, it may sometimes be helpful to consider the synonyms of “some connection”, or “that it touches or stands in some relation to” (*APPGER* at [13], [25]) or to consider whether the request is for “information, in a record supplied to one or more of the section 23 bodies, which was for the purpose of the discharge of their statutory functions” (*APPGER* at [21], [26]; *Lownie* at [57]). But the ‘relates to’ limb must not be read as subject to a test of focus (*APPGER* at [14]) or directness (*Lownie* at [59]-[60]).
9. The scope of the ‘relates to’ limb is not unlimited and there will come a point when any connection between the information and the section 23(3) body is too remote. Assessing this is a question of judgment on the evidence: *Lownie* at [62].
10. The assessment of the degree of relationship may be informed by the context of the information: *Lownie* at [4] and [67].
11. The scope of the section 23 exemption is not to be construed or applied by reference to other exemptions, including section 24: *APPGER* at [17]; *Lownie* at [45] and [52].
12. In a section 23(1) case, regard should be had as to whether or not information can be disaggregated from the exempt information so as to render it non-exempt and still be provided in an intelligible form: *Corderoy* at [43].
13. Section 23(5) requires consideration of whether answering ‘yes’ or ‘no’ to whether the information requested is held engages any of the limbs of section 23: *Savic* at [43], [82] and [92].

14. *The purpose of section 23(5) is a protective concept, to stop inferences being drawn on the existence or types of information and enables an equivalent position to be taken on other occasions: Savic at [60].*

62. Section 26 FOIA provides a qualified exemption and reads (so far as is relevant):

26. – *Defence.*

(1) *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.*

(2) *In subsection (1)(b) “relevant forces” means –*

(a) *the armed forces of the Crown, and*

(b) *any forces co-operating with those forces, or any part of any of those forces.*

...

63. Because section 26 FOIA is a qualified exemption, if the section is engaged there must be a balancing of the public interests in accordance with section 2(2) FOIA, which provides (so far as is relevant):

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) ...

(b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.*

64. There are two alternative limbs to the test set out in section 26(1)(b) FOIA:

- a. The ‘*would prejudice*’ limb involves a conclusion, on the balance of probabilities that the relevant prejudice would result from the disclosure.
- b. The ‘*would be likely to prejudice*’ limb was considered in R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin) at [100] see below.

65. Having identified the applicable interests within the exemption, there are three steps in analysing whether section 26(1)(b) is engaged:

- a. whether the relevant harm would, or would be likely, to occur if the withheld information were disclosed;
- b. whether there is a causal relationship between the potential disclosure and the prejudice against which the exemption is designed to protect;
- c. whether disclosure would, or would be likely, to result in prejudice.

66. In considering the third part of the three steps above, the Tribunal must consider whether prejudice to the capability, effectiveness or security of any part of the

relevant forces “would” or “would be likely to” occur if the information requested was released under FOIA. Disclosure under FOIA is regarded as being to the world in general. See Hogan and Oxford City Council v Information Commissioner [2011] 1 Info LR 588.

67. When considering whether disclosure ‘*would be likely*’ to prejudice the capability, effectiveness or security of any part of the relevant forces the Tribunal should have regard to the following:
- a. The word “likely” connotes a very significant and weighty chance of prejudice to the identified public interest. The degree of risk of that prejudice occurring need not be more likely than not but must be such that there may very well be prejudice to the identified interest. See R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin).
 - b. The prejudice must be real, actual, or of substance, see Department for Work and Pensions v Information Commissioner [2014] UKUT 0334 (AAC).
68. If the three stages above are satisfied in the affirmative, then section 26(1)(b) will be engaged and the Tribunal will go on to consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
69. Section 27 FOIA also creates a qualified exemption, it reads (as relevant)

27 International relations.

(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,

(b) relations between the United Kingdom and any international organisation or international court,

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad.

...

70. In the case of All Party Parliamentary Group on Extraordinary Rendition (APPGER) v Information Commissioner and The Ministry of Defence [2011] UKUT 153 (AAC) the Upper Tribunal held, in the context of section 27 FOIA, that appropriate weight should be attached to evidence from the executive branch of government about the prejudice likely to be caused by disclosure, reflecting the fact that the executive are likely to be better informed and have more experience in assessing the consequences of disclosure. This approach was repeated with approval in Savic v Information Commissioner, Attorney General’s Office and Cabinet Office [2016] UKUT 535 (AAC) at paragraph 173.

71. We note that former compositions of this Tribunal have recognised that where an issue arises as to whether an exemption is engaged that deals with defence or national security such as section 26, they may adopt a similar approach to that set out in APPGER as regards section 27. In doing so, the Tribunal acknowledges the institutional competence of the public authority that made the assessment of the potential damage that could be caused by disclosure. Furthermore, if the exemption in s.26 is engaged there would need to be a “particularly strong public interest” to outweigh the public interest in maintaining the exemption (see for example Arthurs v Information Commissioner, the National Archives and the Ministry of Defence EA/2016/0060 at [97] – [100]).
72. The powers of the Tribunal in determining this appeal are set out in section 58 FOIA, as follows:
- If on an appeal under section 57 the Tribunal considers -*
- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
- On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*
73. In DEFRA v IC and Birkett [2012] PTSR 1299 the Court of Appeal considered ‘late’ reliance by a public authority before the Tribunal on exemptions not considered by the Commissioner in the Decision Notice. The court held that this was legitimate in the light of the need to reach the correct answer which properly balances all considerations and public interests. A process of de novo consideration is bound to discover, on occasion, errors and omissions which must be capable of correction if the correct answer is to be reached.

Analysis and conclusions

74. In our approach to the evidence and submissions we were encouraged to be sceptical of the MOD’s case due to “late reliance” on exemptions. The Appellant’s position was that notwithstanding the case of Birkett (supra), the Commissioner should be encouraging public authorities to perform their task properly the first time and that even though it was not too late as a matter of law for the MOD to rely on other exemptions it reflected on their position generally. Therefore, the Appellant suggested, the Tribunal should pay close scrutiny to the case for the MOD.
75. The Tribunal considers matters *de novo*; our task is not to perform a review of the Commissioner’s investigation or the MOD’s conduct of the matter, but we note that MOD delays in dealing with the request were recognised in the Commissioner’s decision notice.

76. It is not in the public interest to prevent late reliance on exemptions and this has been recognised in the case law that clarifies that the Tribunal may permit reliance on “new” exemptions even during the appeal proceedings, (see above legal framework). It may not be necessary in all circumstances for a public authority at the beginning of the FOIA process to rely on every possible exemption that might apply, but it is necessary for the public authority to keep matters under review and to reconsider their response to a request for information when appropriate. This not only allows further or different exemptions to be relied upon but also enables further information to be released such as occurred in this case. In our view, if it were otherwise intransigence would be encouraged at the expense of transparency. It is in the public interest for the statutory framework set out in FOIA to be applied properly, and this is assisted by the ability of the public authority to rely on further or alternative exemptions from those that were initially raised.
77. However, it is important to remember that each exemption relied upon must be scrutinised carefully to determine whether such reliance is properly founded. That is the function of the Commissioner when a complaint is received under section 50 FOIA. The Tribunal now decides the issues for ourselves applying the legal framework set out above.
78. We found the Appellant and Ms Gibson to be thoughtful and concerned witnesses whose views are deeply and sincerely held.
79. We accept the evidence of Witness MOD-A in open and closed sessions. We found him to be honest, knowledgeable and measured.
80. We have reached our findings having considered all the evidence and in particular based on the evidence of Witness MOD-A. We acknowledge the witness’s expertise and experience gained during his service, including over 20 years with the MOD. We give significant weight to his evidence in accordance with the case law, see APPGER and Savic above, because he is likely to be better informed and have more experience in assessing the consequences of disclosure than others. We find as follows:
- a. The potential damage that disclosure of the withheld information would cause includes threat to life of the UK armed forces, and any forces cooperating with those forces, including those of the US and NATO (“the relevant forces”).
 - b. Certain parts of the information redacted from JSP900 by the MOD relate to one or more security bodies specified within section 23(3) FOIA. That information is not simply something of interest to them but is self-evidently connected to one or more of them.
 - c. The templates contained in JSP900 are not simply standardised forms but are substantive and detailed in their content. The templates are operational and

relate to how to carry out the processes outlined therein. Disclosure of the templates would cause the relevant forces to be put at risk.

- d. Further disclosure of the contents of JSP900 would impair the capability, effectiveness and security of the relevant forces because it gives details of the tactics, techniques and procedures (TTPs) used by the relevant forces. JSP900 is not a high level policy document but includes details of targeting capabilities.
 - e. The information that is in the public domain (such as the US documents listed at paragraph 19 and 20 above) and JSP900 are not identical.
 - f. The current version of JSP900 contains some differences to the 2015 version which has been requested by the Appellant but they are not of substance (being largely of style and introductory sections). The new introductory sections are based on information that is publicly available. Therefore the 2015 version is not simply of historic interest and its release would disclose the content of the current version.
81. The Appellant submits that section 23 FOIA may have been mis-applied given that the MOD only raised this exemption during the Commissioner's investigation. However, it was accepted on his behalf that if a security body is referred to specifically in the withheld information the Appellant does not dispute that such information would be captured by section 23 FOIA.
82. We have read the material and conclude that the passages where this exemption is claimed self-evidently relate to one or more of the security bodies set out in section 23 FOIA. The connection to one or more of the section 23 bodies is not remote when the material is read in context. We have concluded that the information has been disaggregated as far as is possible. The exemption is engaged as regards those parts of the withheld information. The information is within the class and so section 23 is engaged.
83. As section 23 is an absolute exemption there is no requirement to consider the public interest in relation to these sections of JSP900. The Commissioner's decision notice is not in error of law in this regard.
84. Section 26 creates a prejudiced based exemption. We find as follows in relation to the three criteria to be considered in deciding whether the exemption is engaged:
- a. The harm that is relied upon by the MOD is damage to the capability and effectiveness of the relevant forces and an adverse impact on the security of those forces including a threat to life were the material to be disclosed. The alleged harm relates to the interests set out within section 26(1)(b).
 - b. The disclosure of the withheld information would reveal the TTPs used by the relevant forces. The details of how to carry out processes within JSP900 would be disclosed to the world. That disclosure would not simply be to concerned citizens but to everyone, including potential hostile actors who

would then be able to use that information to further their own aims, to the detriment of the capability and effectiveness of the relevant forces.

- c. The disclosure would release details of the UK's targeting capabilities. Therefore, the release of this information has the potential to negatively impact the capability, effectiveness and security of the relevant forces by making it easier for a hostile actor to predict the actions that may be taken by those forces. The ability to predict what will happen would allow that hostile actor to avoid or protect against the activities of the relevant forces and/or to target those forces using the information disclosed.
- d. Disclosure could enable adversaries to adapt or develop their own tactics to deter or disrupt those of the relevant forces.
- e. The potential for prejudice is not diminished by the fact that doctrine and policy documents from other countries/NATO are in the public domain. JSP900 is qualitatively different from those documents.
- f. Nor is the level of prejudice diminished by the general application of JSP900 across the relevant forces. In our view that increases the potential for prejudice given the TTPs used by the entirety of the UK armed forces would be revealed.
- g. The potential prejudice is real, actual and of substance.
- h. Given the nature of the withheld information, its disclosure would result in prejudice of the types set out above. The Commissioner was right to conclude that the level of likelihood of prejudice arising from disclosure is at the higher level provided for in section 26(1)(b). The likelihood is not simply theoretical or hypothetical but we have concluded it is real, actual and of substance, see Department for Work and Pensions v Information Commissioner (supra).
- i. Having regard to the cases of APPGER and Savic (see above paragraph 66) we place significant weight on the evidence of Witness MOD-A given his experience and knowledge, on whose evidence there is a significant risk that prejudice of the types outlined above, including threat to life, would occur given the content of the withheld information, should that material be disclosed.

85. We do not agree with the submission made on behalf of the Appellant that section 26 FOIA is not engaged because JSP900 requested was not the current version of the policy at the time of the request. As stated above we have found that JSP900 is not simply of historic interest, the document may have been superseded in some respects but disclosure of JSP900 would result in prejudice at the time of the response to the request.

86. Having assessed the withheld information for ourselves we reject the Appellant's contention that JSP900 is a document of general policy. It is more than that, being not only a reference document setting out policy but also containing templates which are akin to operational guidance.

87. We considered the weight to be attached to the publication of the US and NATO doctrines or policies listed at paragraph 19 and 20 above. Having compared the documents placed before us by the Appellant to JSP900 we have concluded that there are substantive differences, in particular the absence within those documents of templates or sections about the application of the policies outlined. Therefore we place less weight on the publication of those documents.
88. Reminding ourselves of the three stage test we set out in paragraph 65 above, we find that the applicable interests are *the capability, effectiveness or security of the relevant forces*. The harm we have described above would occur if the withheld information were disclosed. We find that there is a causal relationship between the potential disclosure and the prejudice against which the exemption is designed to protect; disclosure would lead directly to hostile actors having information that they could use to attack the relevant forces or to protect themselves from the relevant forces. The disclosure would therefore result in prejudice to the capability, effectiveness or security of the relevant forces by increasing the efficacy of any attack by hostile actors and decreasing the efficacy of any actions taken by the relevant forces against those hostile actors. There would be a threat to life of the members of the relevant forces.
89. For those reasons we have decided that the exemption in section 26(1)(b) FOIA is engaged in relation to all the withheld information within JSP900 including those passages that are also exempt by reason of section 23, see above, but excepting that personal data to which we refer in paragraph 95 below.
90. As section 26 creates a qualified exemption we have gone on to consider the balance of the public interest and whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
91. We accept that there is a strong public interest in transparency of UK government policy in the area of military operations and the use of force. Disclosure would benefit that public interest by facilitating the public debate concerning, inter alia, the targeting policy of the UK and its allies including in particular, the US. We acknowledge that there is sincerely held concern that the UK may be adopting the policy of the US, without sufficient scrutiny of whether, in doing so, the UK is departing from international law. We acknowledge the serious issues raised by the Appellant as regards collateral damage, human shields and supporting operations post-strike. We note in particular the support of the APPG on Drones, a cross-party interest group of Parliamentarians, in favour of disclosure of JSP 900 and their frustration and concern about a perceived lack of transparency, accountability and scrutiny of military operations and the use of force. We agree that there is a strong public interest in facilitating parliamentary scrutiny of government actions that include the conditions for the deployment of relevant forces but this interest must

also be weighed in the balance and there will be times when it is outweighed by other competing interests.

92. We accept that in the absence of disclosure of JSP900 the public will not be able to scrutinise the legality of the entirety of its contents. Nor will a comprehensive assessment be able to be made about the extent to which, if any, the document reveals that the UK is following the US policy and/or complying with its obligations under international law. However, the MOD has released the redacted version of JSP900 and this goes some way to informing the discussion and enabling the debate.
93. There is a competing public interest in favour of maintaining the exemption. There is a very strong public interest in the defence of the UK and its armed forces. The weight of this public interest is enhanced by:
- a. the likelihood of prejudice occurring meets the higher threshold within section 26 of *would* rather than *would be likely to*;
 - b. the withheld passages within JSP900 relate to all military operations not just a section of them such as the use of UAVs. We reject the suggestion that the general application of the document lessens the public interest in maintenance of the exemption. Given the possibility of prejudice to all sectors of operation by the relevant forces the risk of prejudice is not confined to any part of the relevant forces where it could potentially be contained, the risk applies equally to all the relevant forces which magnifies the potential effect of the disclosure;
 - c. the prejudice that would be caused is not simply to capability or effectiveness (which types of prejudice are capable of themselves in attracting a significant public interest in maintenance of the exemption) but also to security, in the form of a threat to life of the relevant forces. The Appellant accepted that the information ought not to be disclosed should there be a risk to any person that would be caused by the release of the information.
94. Having considered the competing public interests we have concluded that, in this case, the balance falls in favour of maintaining the exemption. We recognise the strength of the public interest in furthering debate on the issues raised by the Appellant and in effective scrutiny of the legality of government actions, however, the nature and seriousness of the competing public interests that include a risk to life of the relevant forces means that the balance falls in favour of maintaining the exemption.
95. It is not necessary for us to consider the Commissioner's findings on the application of section 40(2) FOIA to the telephone number of an MOD employee. It is accepted by all parties that this information is personal data as defined in section 3(2) Data Protection Act 2018 and disclosure of that data would breach the data protection principle in article 5(1)(a) General Data Protection Regulation (as it then was)

because it would not be lawful as required by article 6(1)(f) GDPR. We indicate for the avoidance of doubt that we agree with the Commissioner's analysis within the decision notice and conclude that the decision notice is not in error or law in this regard.

96. We note the procedural failings in the handling of the information request set out in the Commissioner's decision. The Commissioner concluded that there had been a breach of section 17(1) FOIA because the MOD did not provide the Appellant with a substantive response to the request for over three months at which point the MOD sent a refusal notice relying on section 26. Furthermore, there was a breach of section 10(1) FOIA in that some of the requested information was not supplied to the Appellant until after the expiry of the required statutory period. These breaches were not disputed by the MOD and we agree with the Commissioner's assessment of the chronology of the handling of the request by MOD.
97. In the light of our findings above it is not necessary for us to consider whether the requested information is exempt by reason of sections 24 or 27 FOIA. We make no finding as to whether or not those exemptions are engaged.
98. For all these reasons we have decided that the decision notice under appeal is not in error of law, nor does it involve a wrongful exercise of discretion and accordingly we dismiss the appeal.

Signed

Date: 15 January 2024

Judge Griffin

Addendum

This decision was sent to the respondents under embargo in December 2023. Suggested clerical amendments have been considered and incorporated into the above decision where agreed.