

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 June 2016

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

#### Decision (including any steps ordered)

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1. The complainant has requested information from the Ministry of Defence (MOD) regarding ownership of the intellectual property for the Watchkeeper unmanned aerial vehicle. The MOD provided the complainant with some information but sought to withhold the remainder on the basis of the exemptions contained at sections 26(1)(b) (defence), 41(1) (information provided in confidence) and 43(2) (commercial interests) of FOIA. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 26(1)(b). However, in handling the request the MOD breached section 17(1) of FOIA.

#### Request and response

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2. Following an earlier exchange of correspondence, the complainant submitted a request to the MOD on 29 September 2015 seeking the following information:

*'Please in the first instance could you respond to Question 3, as I do not believe that answering this question could create a burden in terms of time and resources.*

*3). To whom does the intellectual property for Watchkeeper UAVs belong?*

*If, secondly, you are able to provide the answer to Question 4 (as presumably answering this does not involve providing a specific lengthy document) I would be very grateful.*

4). *What plans does the MOD have for the future development of Watchkeeper UAVs? Please provide dates of the expected developments.'*

*If you are not able to answer all of this question, please provide the information that you are able to provide.'*

3. The MOD responded on 30 September 2015 and explained that:

*'As the two questions you have asked are not specifically seeking recorded information, and if you are content for us to do so, we can answer these outside the bounds of the FOI Act. Please could you therefore advise me if you are content for us to proceed down this route, and we will seek to provide answers as quickly as possible.'*

4. The complainant responded on 30 September 2015 and explained that:

*'I find it puzzling that such information as would be required to respond to these two questions is not recorded, and would be grateful if you could confirm this.'*

*If indeed it is not recorded, I would be very grateful for a response outside the FOI Act. If it is recorded, I would be grateful if you could respond under the FOI Act.'*

5. The MOD responded on 16 October 2015. In the complainant's view this response did not provide her with the information which she had requested and nor did it constitute a valid refusal notice in line with section 17 of FOIA.

6. Consequently, she contacted the MOD on the same day to confirm that she wanted to be provided with a response under FOIA. She confirmed the scope of her request in an email dated 19 October 2015, stating that she wished to know *'To whom does the intellectual property for Watchkeeper UAVs belong?'*

7. The MOD contacted the complainant on 22 October 2015 and confirmed that it held information falling within the scope of her request but considered the information to attract section 43 (commercial interests) of FOIA and it needed further time to consider the balance of the public interest test. The MOD also indicated that it considered sections 41 (information provided in confidence) and 40 (personal data) of FOIA to apply.

8. The MOD sent further public interest extension letters on 16 and 30 November 2015.

9. The MOD provided a substantive response to the request on 14 December 2015. It confirmed that the information relating to the intellectual property of Watchkeeper UAVs is detailed in annexes I and L of the Watchkeeper Development, Manufacture and Initial Support (DMIS) contract. The MOD provided the complainant with a redacted version of annex L but withheld annex I in full. The MOD explained that the withheld information was exempt from disclosure on the basis of the exemptions contained at sections 26(1) (defence), 43(1) (trade secrets) and 43(2) (commercial interests) of FOIA.
10. The complainant contacted the MOD on 17 December 2015 in order to ask for an internal review of this decision.
11. The MOD informed the complainant of the outcome of the internal review on 18 March 2016. The review concluded that the MOD's response of 16 October 2015 should not have treated request 3 under its business as usual procedure. Rather it was clear that recorded information falling within the scope of that request was held but that it would have been exempt from disclosure for commercial reasons. The MOD therefore accepted that it should have issued a refusal notice under section 17 of FOIA in respect of this request. However, the review concluded that there was no specific recorded information which provides a definitive answer to request 4 and thus it was appropriate for the MOD to consider this request under its business as usual procedure. With regard to the application of the exemptions to the information falling within the scope of request 3, the review concluded that section 43(1) did not apply. However, the review concluded that section 26(1)(b) had been correctly relied upon to withhold all of the information contained in annex I and the small amount of information redacted from annex L. Furthermore, the review also concluded that the information contained in annex I was also exempt from disclosure on the basis of section 43(2).<sup>1</sup>

## **Scope of the case**

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12. The complainant contacted the Commissioner on 7 March 2016 (ie before the MOD had completed its internal review of her request). She explained that her grounds of complaint were as follows:
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<sup>1</sup> In its submissions to the Commissioner, the MOD also indicated that it considered the withheld information to be exempt from disclosure on the basis of the exemption contained at section 41(1) of FOIA.

- The MOD's failure to respond promptly, and under FOIA to her request of 29 September 2015. She argued that it was clear that the MOD would hold recorded information falling within the scope of her request;
- The MOD's delays in providing her with a response to her request once it had been formally accepted as an FOI request;
- The MOD's failure to complete the internal review in a timely manner; and,
- She argued that there was a compelling public interest in the disclosure of the withheld information.

## Reasons for decision

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### Section 26 - defence

13. The MOD argued that all of the withheld information was exempt from disclosure on that basis of section 26(1)(b). This exemption states that:

*'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice...  
...(b) the capability, effectiveness or security of any relevant forces'*

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

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.

### *The MOD's position*

15. The MOD argued that the withheld information was exempt from disclosure on the basis of section 26(1)(b) because it is operationally sensitive and reveals aspects of the wider capabilities of the

Watchkeeper system. The MOD suggested that disclosure of this information could support a potential adversary in developing countermeasures against Watchkeeper and would therefore prejudice the capability, effectiveness and security of any relevant forces. In its submissions to the Commissioner, the MOD elaborated on this position and explained in greater detail how such prejudice could arise. However, such submissions contain information which is itself considered to be exempt from disclosure by the MOD. Consequently, the Commissioner has not referred to these submissions in this notice.

### *The Commissioner's position*

16. With regard to the first criterion of the test set out at paragraph 14, the Commissioner accepts that the type of harm that the MOD believes would occur if the information was disclosed is applicable to section 26(1)(b).
17. With regard to the second criterion, having considered the detailed explanation provided to him by the MOD the Commissioner is satisfied that disclosure of this information clearly has the potential to harm the capability and effectiveness of armed forces in the manner suggested by the MOD. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which section 26(1)(b) is designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the MOD believes would occur is one that can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in prejudice to the capability, effectiveness or security of British armed forces.
18. In relation to the third criterion the Commissioner is satisfied that disclosure of the requested information would represent a real and significant risk to the effectiveness, security and capability of British forces. Furthermore, the Commissioner is also satisfied that the likelihood of this prejudice occurring is one that meets the higher threshold of likelihood. He has reached this finding given the specific and numerous ways in which the MOD's submissions set out how such prejudice could occur. Section 26(1)(b) is therefore engaged.

### **Public interest test**

19. Section 26 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 26(1)(b) outweighs the public interest in disclosing the information.

### **Public interest arguments in favour of maintaining the exemption**

20. The MOD argued that there is a strong public interest in maintaining the safety and security of UK armed forces and UK air platforms generally and while deployed operationally. Moreover, it argued that there was a strong public interest in preventing the disclosure of information which could prompt, aid, or increase the possibility or effectiveness of an attack or other significant threat to UK forces.

### **Public interest arguments in favour of disclosing the information**

21. The MOD acknowledged that there was a strong public interest in the operations of government being as open and transparent as possible about military platforms and their capability which are funded by the UK taxpayer. More specifically, it acknowledged that there was a public interest in the operation of UAVs and specifically, Watchkeeper. Disclosure of Watchkeeper's intellectual property rights (IPR) may facilitate a greater understanding of how Watchkeeper operates and thus could contribute to the wider public debate on the operation of UAVs.
22. The complainant argued that there was a strong public interest regarding the intellectual property of Watchkeeper and to whom this belongs given the amount of money, estimated to be over a billion pounds, which has been spent developing this platform. The complainant noted that it had already been in the public domain that Thales had signed an agreement to create an armed version of Watchkeeper for Poland. She argued that if public money is used to develop technology which, due to the ownership of the intellectual property, is used and sold by private companies, then the public deserves to know this.

### **Balance of the public interest arguments**

23. The Commissioner recognises that there is a strong public interest in the government being open about how taxpayers' money is spent. In the circumstances of this case, disclosure of the withheld information would provide a clear and direct insight in the ownership of the IPR in relation to the Watchkeeper technology. The Commissioner accepts that there is public interest in the disclosure of this information for the reasons advanced by the complainant. In his view this interest should not be underestimated given the amount of money involved. Furthermore, disclosure would also provide the public with an insight into the capabilities of Watchkeeper. However, the Commissioner believes that there is an exceptionally weighty public interest in protecting the capability, effectiveness or security of British armed forces. As discussed above, disclosure of the withheld information would undermine the

armed forces in a number of different ways. Consequently, despite the significant weight that the Commissioner accepts should be given to the public interest arguments in favour of disclosing the withheld information, he has reached the conclusion that the public interest favours maintaining the exemption.

24. In light of his findings in relation to section 26(1)(b), the Commissioner has not considered the MOD's reliance on the exemptions contained at sections 41(1) and 43(2) of FOIA.

### **Procedural matters**

25. As indicated above, the complainant is dissatisfied with the MOD's failure to accept her request of 29 September 2015 as an FOI request. As the MOD acknowledged in its internal review response, it should have dealt with request 3 in her email of 29 September under FOIA and provided the complainant with a valid refusal notice and its failure to do so represents a breach of section 17(1).
26. The complainant is also dissatisfied with the MOD's delay in providing her with a response to her request once it had been formally accepted as an FOI request. The Commissioner understands that the MOD accepted the complainant's email of 19 October 2015 as a valid request. On 22 October 2015 it acknowledged receipt of this request and explained that it aimed to provide a substantive response within 20 working days unless it needed additional time to consider the balance of the public interest. The MOD subsequently contacted the complainant on 16 and 30 November 2015 and explained that it needed further time to consider the balance of the public interest. It provided the complainant with the outcome of these deliberations on 17 December 2015.
27. Section 17(3) allows a public authority to extend its consideration of the public interest for a reasonable period of time if necessary. The Commissioner believes that this should normally be no more than an extra 20 working days, which is 40 working days in total to deal with the request. Any extension beyond this time should be exceptional.
28. In the circumstances of this case, the MOD therefore took 43 working days to complete its public interest test considerations. The Commissioner is persuaded that as the time taken by the MOD only marginally exceeds 40 working days, and given the sensitive nature of the information, the time taken by the MOD to complete its public interest considerations was not unreasonable. Therefore, the MOD has not breached section 17(3).

## **Other matters**

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29. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that they should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in complex cases to be completed within 40 working days.
30. In the circumstances of this case the complainant requested an internal review on 17 December 2015. The MOD informed her of the outcome of the internal review on 18 March 2016. It therefore took the MOD 63 working days to complete its internal review. The Commissioner considers this to be unsatisfactory. In the future he expects the MOD to ensure that internal reviews are completed within the timeframes set out within his guidance.



## Right of appeal

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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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

**Signed .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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