Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 2016

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) asking how many Reaper unmanned aerial vehicles were engaged in operations against Daesh in Iraq and Syria and at which bases were they deployed. The MOD withheld the information on the basis of the exemptions contained at sections 26(1)(b) (defence) and 27(1)(a) (international relations) of FOIA. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 26(1)(a) and that in all the circumstances of the case the public interest favours maintaining the exemption.

Request and response

2. The complainant submitted the following requests to the MOD on 1 March 2016:

'Under the freedom of Information Act please can you tell me

a) How many RAF Reaper UAVs [unmanned aerial vehicles] are engaged in operations against ISIL/Daesh in Iraq and Syria at today's date (1 March 2016)?

b) At which bases are the UK's Reaper fleet currently deployed to at today's date (1 March 2016)? If you do not wish to give the exact location for security reasons, please can you detail their location by country?

c) Which RAF aircraft have been engaged in flights over Libyan airspace since 1 January 2016 to current date (1 March 2016) as detailed by FCO Minister Tobias Ellwood MP to Foreign Affairs Select Committee on 9 February 2016. If there has been more than one sortie, please can you give number of sorties per month for each aircraft type that has flown over Libyan airspace.'

3. The MOD responded on 31 March 2016 and explained that it held the information requested but it considered this to be exempt from disclosure on the basis of the exemptions contained at sections 26 and 27 of FOIA.

4. The complainant contacted the MOD on 4 April 2016 and asked it to conduct an internal review of this decision.

5. The MOD informed him of the outcome of the internal review on 9 June 2016. The review explained that section 26(1)(b) of FOIA was being applied to all parts of the request whilst section 27(1)(a) only applied to the first and second limbs of the request. The MOD also explained that it could not provide the complainant with its full reasoning for relying on these exemptions because to do so would in itself involve the disclosure of information considered to be exempt.[1]

Scope of the case

6. The complainant contacted the Commissioner on 21 June 2016 in order to complain about the MOD's handling of his complaint. He explained that he wished to challenge the MOD's decision to withhold the information falling within the scope of the first and second limbs of his request ('the withheld information'), but he did not wish to challenge the MOD's decision to withhold the information falling within the third limb of his request.

[1] Section 17(4) of FOIA states that a public authority is not obliged to make a statement explaining why an exemption applies, if or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Reasons for decision

Section 26 – defence

7. As noted above, the MOD withheld the information falling within scope of the first and second limbs of the request on the basis of section 26(1)(b) of FOIA. 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'*

8. 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.

<u>The MOD's position</u>

9. In its internal review response, the MOD explained that there was a degree of sensitivity about the number of UAVs, including Reaper, which form part of the UK Forces wider air capability, their basing and deployment involved in current operations. It argued that disclosure of the information falling within the scope of the first and second limb of the request would be likely to assist opposing forces in building up a detailed picture of UK tactics and strike capabilities. The MOD explained that in light of such information enemy forces could then adjust their efforts, training, tactics and planning activities to exploit the likely use (and any perceived limitations) of UAV operations, including Reaper, for both the UK and other nations that use them and be able to develop better measures to counter them. The MOD also confirmed that it considered the exemption to be engaged at the lower level of 'would be likely to' prejudice.

10. The MOD provided the Commissioner with more detailed submissions to support its reliance on section 26(1)(b). However, the Commissioner cannot include these submissions here as to do so would reveal information that is itself exempt from disclosure.

The complainant's position

11. The complainant suggested that a number of factors undermined the MOD's position that disclosure of the withheld information would be likely to prejudice the capability, effectiveness or security of UK forces. The Commissioner has summarised the complainant's submissions below, along with footnotes which include the supporting evidence he cited.

- In relation to the first limb of his request the complainant noted that the MOD had released details of the numbers of other UK military aircraft engaged in military operations against Daesh without it being prejudicial to their security, capability or effectiveness.[2]

- In relation to the second limb of his request the complainant noted that the MOD has regularly stated that Tornado, Typhoon and other UK military aircraft are based at, and undertaking missions against Daesh, from RAF Akrotiri in Cyprus without it being prejudicial to their security, capability or effectiveness.[3]

- The MOD quite happily released both the number of Reaper UAVs engaged in combat operations against the Taliban in Afghanistan and the location of their then base in Afghanistan (Kandahar Airfield) without security problems.[4]

- The MOD regularly publishes updates on UK air military operations in Iraq and Syria including details of air strikes carried out by Reapers

[2] MOD leaflet 'UK Military Action Against ISIL in Numbers' available at https://dronewarsuk.files.wordpress.com/2016/04/uk-military-action-against-isil-in-numbers-mod.jpg

[3] See for example MOD press releases 'Defence Secretary visits UK personnel taking the fight to Daesh' 5 December 2015, https://www.gov.uk/government/news/defence-secretary-visits-uk-personnel-taking-the-fight-to-daesh

[4] See Hansard, 30 Oct 2012 : Column WA116 http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121030w0001.htm#12103040000014 and also MOD press release, 'More RAF Reapers Take To The Skies', 03 July 2014, http://www.raf.mod.uk/news/archive/more-raf-reapers-take-to-the-skies-03072014

and other aircraft which it could be argued, gives a greater insight into tactics and strike capabilities than the number of aircraft deployed.[5]

- In May 2016 a small number of media organisations - The Sun, Sky News and The Daily Signal - were invited to visit the location of (at least some of) the UK's Reaper drones in order to interview RAF personnel operating the aircraft.[6] The complainant argued that whilst the location of the base and the drones was not directly mentioned, there was enough information contained in the reports, along with other easily accessible information in the public domain, to identify the location of the base.

- The MOD had, in a limited way, put part of the withheld information in the public domain in light of the comments of the Defence Secretary on 4 June 2015 to reporters in which he confirmed that all ten British Reapers were deployed.[7]

The Commissioner's position

12. With regard to the first criterion of the test set out at paragraph 8, the Commissioner accepts that the type of harm that the MOD believes would be likely to occur if the information was disclosed is applicable to interests protected by section 26(1)(b) of FOIA.

13. Having considered the detailed submissions provided to her by the MOD, the Commissioner is satisfied that disclosure of the withheld information clearly has the potential to harm the capability and effectiveness of UK forces in operations against Daesh. 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

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[5] Update: air strikes against Daesh: https://www.gov.uk/government/news/update-air-strikes-against-daesh

[6] See Nolan Peterson, 'Deep Targets': On the Ground With British, US Drone Forces Attacking ISIS, The Daily Signal, 02 May 2016, http://dailysignal.com/2016/05/02/deep-targets-on-the-ground-with-british-u-s-drone-forces-targeting-isis/ Alistair Bunkall, Inside Top-Secret Drone Operation Against IS, Sky News, 10 May 2016, http://news.sky.com/story/1690440/inside-top-secret-drone-operation-against-is David Willetts, Meet Tina… the RAF Reaper drone pilot flying missions from secret base to take down ISIS, The Sun, 03 May 2016, https://www.thesun.co.uk/archives/news/1158578/meet-tina-the-raf-reaper-drone-pilot-flying-missions-from-secret-base-to-take-down-isis/

[7] http://www.defensenews.com/story/defense/air-space/strike/2015/06/03/uk-dicusses-joint-reaper-pilot-training-with-france/28408303/

designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the MOD believes would be likely to occur is one that can be correctly categorised 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.

14. In relation to the third criterion, the Commissioner is satisfied that the likelihood of prejudice occurring if the withheld information was disclosed is clearly one that is more than hypothetical. Rather, having considered the MOD's submissions, the Commissioner is satisfied there is a real and significant risk of this prejudice occurring. Although the Commissioner cannot set out in any detail in this notice why she has reached this decision, she wishes to emphasise that she has considered, and paid particular attention to, the specific points advanced by the complainant, ie the arguments set out at paragraph 11. However, the Commissioner can confirm that in her view there are a number of significant differences between the information previously and proactively disclosed by the MOD about its operations against Daesh in Iraq and Syria, and the use of Reapers in Afghanistan, and the nature of the withheld information in this case.

15. The Commissioner is therefore satisfied that the withheld information is exempt from disclosure on the basis of section 26(1)(b) of FOIA.

Public interest test

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

Public interest in disclosure of the withheld information

17. The MOD acknowledged that disclosure of the withheld information would increase public understanding of how UK armed forces are deployed, increase public confidence and trust in overseas operations and promote openness and transparency about such matters.

18. The complainant argued that, in light of the evidence he put forward to support his position that the exemptions were not engaged (see paragraph 11, it would appear that the MOD had introduced a policy of not releasing details of the number of Reapers engaged in operations or their location. The complainant suggested that this policy would appear to have been introduced following the decision to continue to use Reapers beyond the Afghanistan deployment.

19. Furthermore, the complainant emphasised that there is a considerable national and international public disquiet about the use of armed drones to undertake covert lethal operations outside the context of conventional armed conflicts. The complainant noted that while the UK has in the past distanced itself from such use by the United States, in August 2015 the Prime Minster told the House of Commons that the UK had used one of its Reapers to target and kill suspected terrorist Reyaad Khan.[8] The complainant noted that in his statement to MPs, the Prime Minister confirmed that this operation was a 'new departure' for the UK and that other such operations were likely.

20. The complainant argued that it was important to note that the MOD has made clear that the targeted killing of Reyaad Khan by British forces utilizing a Reaper was not part of Operation Shader, the name given to UK military operations against Daesh. The complainant also noted that in evidence to the parliamentary Joint Human Rights Committee about the use of armed drones, the Defence Secretary Michael Fallon reiterated that the government 'wouldn't hesitate to take similar action again.'[9] The complainant emphasised that over the past decade it has become accepted as a constitutional convention that the House of Commons should have an opportunity to debate any proposed use of military force, except when there is an emergency and it would not be appropriate to consult MPs in advance. Thus the complainant argued that the government has accepted that there should be proper public accountability and oversight over use of British military force.

21. Consequently, the complainant argued that a blanket policy of refusing details of the number of Reaper drones on operations or their location enables covert use of such systems, and prevents rightful public oversight of the deployment of UK military force, and thus there was a compelling public interest in the disclosure of the withheld information.

Balance of the public interest test

22. The Commissioner recognises that there are legal and ethical considerations in the use of UAVs. She therefore agrees that there is a public interest in the disclosure of information which would inform and further a public debate about the use of such weapons by UK armed forces. In the Commissioner's opinion, disclosure of the withheld

[8] http://www.bbc.co.uk/news/uk-wales-34176790

[9] https://www.theguardian.com/world/2015/sep/08/uk-would-not-hesitate-to-carry-out-more-strikes-against-british-jihadis

information could go some way to informing that debate by revealing the number of Reapers deployed at a particular date against Daesh and the locations from which they were deployed. Nevertheless, the Commissioner would urge some caution about placing too much weight on the public interest in the disclosure of this particular information. Whilst its disclosure would increase transparency around the use of Reapers in the fight against Daesh, the information sought is relatively limited in nature. In the Commissioner's opinion there is a limit to the extent that disclosure of this information would inform a debate about the use of UAVs.

23. Furthermore, in the Commissioner's opinion there is an exceptionally strong public interest in protecting the capability, effectiveness and security of British armed forces. As discussed above, the disclosure of the withheld information would represent a real and significant risk of assisting Daesh in developing a detailed picture of UK tactics and strike capabilities. In light of this, in the Commissioner's opinion there would need to be an exceptionally compelling case for the public interest in disclosure of the information, which in her view there is not. The Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 26(1)(b) of FOIA.

24. In light of her decision in respect of section 26(1)(b), the Commissioner has not considered the MOD's reliance on section 27(1)(a).

Right of appeal

25. 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
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. 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.

27. 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
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF