

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 February 2020

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

Decision (including any steps ordered)

1. The complainant submitted a request to Ministry of Defence (MOD) for a copy of the second edition of the 'JSP900: UK Targeting Policy'. The MOD withheld the document on the basis of sections 24(1) (national security), 26(1)(b) (defence), 27(1)(a) (international relations) of FOIA in its entirety. During the course of the Commissioner's investigation it provided the complainant with a redacted version of the document. It explained that the remaining withheld information was exempt from disclosure on the basis of the exemptions previously cited, but also on the basis of sections 23(1) (security bodies) and 40(2) (personal data).
2. The Commissioner has concluded that the remaining withheld information is exempt from disclosure on the basis of sections 26(1)(b), 23(1) and 40(2) of FOIA. However, she has also concluded that the MOD breached section 10(1) and section 17(1) of FOIA in the manner in which it handed this request.
3. The Commissioner does not require any steps to be taken.

Request and response

4. The complainant submitted a request to the MOD on 15 October 2018 seeking a copy of the following document:

'JSP900: UK Targeting Policy (edition II, September 2015)'

5. The MOD responded on 1 February 2019 and confirmed that it held the requested information but it considered this to be exempt from disclosure on the basis of section 26 (defence) of FOIA.
6. The complainant contacted the MOD on 20 March 2019 and asked it to conduct an internal review of this refusal.
7. The MOD informed him of the outcome of the internal review on 5 June 2019. The 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) of FOIA.
8. During the course of the Commissioner's investigation of this complaint, the MOD contacted the complainant on 29 October 2019 and provided him with a redacted version of the document he had requested. The MOD confirmed that the redacted material was considered to be exempt from disclosure on the basis of the exemptions cited in the internal review and furthermore that section 23 (security bodies) also applied to some of this information.¹

Scope of the case

9. The complainant initially contacted the Commissioner on 5 June 2019 in order to complain about the MOD's handling of his request. Following the MOD's disclosure of a redacted version of the requested document, the complainant confirmed to the Commissioner that he continued to dispute the MOD's reliance on the exemptions it had cited to withhold the remaining information. He argued that the various exemptions were not engaged, and even if they were, then in his view the public interest favoured disclosure of the withheld information.
10. He was also dissatisfied with the length of time it took the MOD to respond to the request and to complete the internal review. Furthermore, he explained that he was dissatisfied with its late application of the section 23(1) exemption by the MOD.

Reasons for decision

¹ The MOD subsequently confirmed to the Commissioner that it had also redacted a small portion of information on the basis of section 40(2) (personal data) of FOIA.

Section 26 – defence

11. The MOD argued that significant parts of the redacted information were exempt from disclosure on the basis of section 26(1)(b) of FOIA. This 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.'

12. 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

13. In its internal review response the MOD noted that as the title of the requested document made clear, the withheld information contained the targeting policy the UK adopts at every stage of a military operation and therefore would reveal current operational tactics (albeit an older edition) and capability performance. The MOD argued that disclosure of the information would give hostile nations and enemy combatants an insight into the decision making process, enabling them to change their tactics, techniques and procedures. The MOD argued that this would increase the risk to UK forces. The MOD argued that the level of prejudice was set at the higher threshold of 'would' prejudice.
14. In its submissions to the Commissioner, the MOD maintained this line of argument emphasising that the information contains operational tactics, techniques and procedures (TTPs) used and followed by UK armed forces in conducting targeting operations. It explained that the TTPs

have not changed significantly over successive editions of the document and are likely to be used in the future. The MOD noted that the document also includes details of targeting capabilities. Furthermore, the MOD made reference to certain parts of the withheld information to which section 26 had been applied in order to explain why it considered such information to be exempt from disclosure. As these submissions make reference to the content of the withheld information the Commissioner has not included these in this decision notice.

The complainant's position

15. The complainant argued that this exemption was not engaged. He noted that the information requested could be described as general policy direction and guidance. He suggested that it did not contain specific plans for specific military operations.
16. Furthermore, the complainant noted that the NATO Joint Targeting Doctrine was in the public domain and that the US had made its own joint targeting policy public. In light of such disclosures, the complainant questioned why the UK could not publish its targeting policy in full. He also argued that if the UK had adopted any of the US policy then such parts of it could not be exempt from disclosure.²

The Commissioner's view

17. With regard to the first criterion, the Commissioner accepts that the type of harm that the MOD believes would occur if the information was disclosed is applicable to the interests protected by section 26(1)(b) of FOIA.
18. With regard to the second criterion, having considered the submissions provided to her by the MOD, the Commissioner is satisfied that disclosure of this information clearly has the potential to harm the capability and effectiveness of UK forces in operations given that it details the TTPs used by UK forces and also outlines their targeting capabilities.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/628215/20160505-nato_targeting_ajp_3_9.pdf

https://www.justsecurity.org/wp-content/uploads/2015/06/Joint_Chiefs-Joint_Targeting_20130131.pdf

19. Whilst the information does not, as the complainant suggests, contain details of specific military operations it is clearly more than a high level policy and general guidance. That is to say the redacted information has a direct application for operations carried out by UK forces. Furthermore, the Commissioner accepts that it is logical to argue that the disclosure of the UK forces' TTPs and targeting capability would enable adversaries to adapt or develop their tactics to deter or disrupt the operations of UK forces. As a result that disclosure of the withheld information clearly has the potential to harm the capability and effectiveness of UK forces. 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 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.
20. 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, taking into account the MOD's arguments and considering the content of the withheld information the Commissioner is satisfied there is a real and significant risk of this prejudice occurring as the information would directly assist enemy forces in building up a picture of the targeting practices. She also agrees with the MOD that the higher threshold of would prejudice is met.
21. The Commissioner has therefore concluded that section 26(1)(b) is engaged in respect of all of the information to which the MOD has applied this exemption.
22. In reaching this conclusion the Commissioner has taken into account the information in the public domain cited by the complainant. In the Commissioner's view the information withheld by the MOD is different in content to the information identified by the complainant. As a result the availability of the NATO and US targeting policies does not in her view undermine the MOD's case for applying section 26(1)(b) to parts of the requested document.

Public interest test

23. 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 withheld information.

Public interest in favour of disclosing the withheld information

24. The MOD recognised that there is a public interest in how the UK conducts its targeting operations and that the full release of JSP900 would inform public debate into how decisions about these operations were made and approved, as well as providing assurance that the MOD complies with all relevant humanitarian legislation and takes appropriate care and consideration when conducting kinetic strikes to minimise the impact of armed conflict on civilian populations.
25. The complainant provided the Commissioner with detailed submissions to support his view that the public interest favoured disclosure of the information. The Commissioner has summarised these submissions below.
26. The complainant argued that there is a clear and growing public debate over US targeting policy, particularly in relation to apparent assassinations (so called targeted killings outside of armed conflicts) by the Central Intelligence Agency and US Special Forces across Asia and the Middle East and North Africa region by use of drone strikes.
27. The complainant argued that this request concerns pressing questions as to what extent the UK is following the US down this targeting policy slope which breaks a long history of customary international law and undermines the body of international humanitarian law and international human rights law that has been developed to protect the status of civilians in armed conflicts, and the right to life of individuals outside of war.
28. The complainant argued that a clear understanding of these issues can only be fostered with clarity and transparency of the government's position which included the full disclosure of details of the UK's targeting policy. The complainant argued that a number of international civil society organisations, parliamentary inquiries and legal experts attest to the urgent need for clarity of UK targeting policy which is still growing.
29. In order to illustrate this point the complainant cited, amongst other sources, the findings of the All Parliamentary Group on Drones report 2018 which concluded that:

'The position of the Government on the proper test to be applied to determine who may be targeted in a non-international armed conflict is not clear. The Joint Service Manual on the Law of Armed Conflict does not address the issue of the 'continuous combat function' principle. The Government has confirmed that JSP900: UK Targeting Policy (edition II, September 2015) contains the policy and direction on targeting, and guidance on the processes involved and best practice to apply.

However it has confirmed that no copy will be released to Parliament or the public. In the absence of any information on the test the UK armed forces apply when targeting members of ISIL, it is impossible to determine if the targeting process is lawful.³

30. And a report of the Joint Committee on Humans Rights:

'If the availability of drone technology is not to lead to a significant lowering of the level of protection for the right to life, it is important to ensure that there is absolute clarity about the legal frameworks that apply to the use of drones for targeted killing, and that all those involved understand exactly what those legal frameworks require of them.'⁴

31. More broadly, the complainant argued that violations of the universal right to life affect us all. The imposition of unaccountable military power over civilian populations in the name of counterterrorism is counterproductive. Terrorism of all kinds must be prevented, but to allow a paradigm shift in the state power over life to pass by in the shadows of secret government policy unchecked is the height of irresponsibility to present and future generations, allowing a far more dangerous state terrorism to prosper at the expense of civil, minority and individual human rights, the rule of law, and international peace and security. In such grave circumstances the complainant argued that there could hardly be a more seriously strong and urgent public interest than that for disclosure of the withheld information.
32. With regard to the particular public interest under section 26 of FOIA, the complainant argued that there was a public interest in disclosure 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.
33. The complainant also provided submissions which focused on particular topics within the withheld information. He noted that the part of the redacted information related to the collateral damage. The complainant noted that the US uses its own legal framework for the calculation of

³ APPG on Drones report (2018) <http://appgdrones.org.uk/appg-inquiry-into-the-use-of-armed-drones-working-with-partners/> p. 63

⁴ Joint Committee on Human Rights 'The Government's policy on the use of drones for targeted killing' <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf> paragraph 1.34

risks of collateral damage in military operations – as opposed to NATO framework - and so there is clearly a public interest in knowing where the UK stands in relation to this question given that the majority of the public are civilians. The complainant suggested that the redacted information may contain some clarity on where the UK stands on this issue in which case the public interest clearly weighs in favour of its disclosure. The complainant argued that if the UK agrees with the US position and not the NATO position this is information that should be in the public domain as it shows a change in policy that has been made beyond civilian democratic oversight by the military to disregard certain established principles of international humanitarian law (IHL).

34. The complainant noted that the term 'human shield' was used in the disclosed document. He argued that in IHL, the concept of 'human shield' as a category of civilian continues to be a controversial one because some state actors such as Israel and the USA have sought to use it to blur protected civilian status, undermining the keystone principle of distinction. The complainant suggested that this may allow pre, and post-strike assessments of civilian damage to discount numerous individuals who would otherwise be considered civilians. He argued that this discounting of civilian status may also provide a pre-strike excuse for more powerful than otherwise use of kinetic force against a military object where civilian damage is likely to occur, or perhaps a distorted post-strike statistical analysis of the impact of military operations in reporting back to democratic oversight committees or government officials.
35. The complainant noted that the category of 'human shields' was first included in the US Law of War manual in June 2015, so there is a clear concern that this UK targeting policy refers to it just a few months later in September 2015. He argued that this again points to the fact that the UK may have followed the lead of the US in a controversial practice and therefore the public interest in disclosure of this redacted section of the document is strong and outweighs that of continued secrecy.
36. Finally, the complainant noted that from part of the information which the MOD had disclosed, he argued that it was clear that the MOD had sought to manage consent of the UK domestic population for military operations in so called 'Media Operations' as part of the overall Full Spectrum Targeting (FSpecT) military strategy introduced for the first time in this edition of JSP900, according to its introduction. As the specified domestic 'target audience' of MOD media operations designed to influence public opinion, the UK public have a clear public interest in the full disclosure of how such media operations are conducted as part of the (FSpecT) process and to what extent such operations use military grade social media data analytics technologies (revealed alarmingly in

the Cambridge Analytica case) in covert operations to maintain domestic consent for military strikes.

Public interest in maintaining the exemption

37. The MOD argued that the public interest favoured maintaining the exemption given the impact on the effectiveness of UK forces if the information was disclosed.

Balance of the public interest

38. The Commissioner recognises the importance and significance of the disputed information. As perhaps best illustrated by the quote from the APPG, there is a clear and undisputable public interest in the disclosure of the UK's targeting policy. The Commissioner acknowledges that the complainant has made forceful and persuasive arguments to demonstrate the broader public interest in disclosure of the information. The Commissioner believes that such arguments attract additional weight and importance given the manner in which the UK may in the future engage with enemy combatants outside of 'normal' warfare, for example, the targeted killing of two ISIS fighters in Syria in 2015.⁵ The Commissioner also accepts that based on the redacted version of the JSP900 which the complainant has been provided with the points he raised regarding collateral damage, human shields and the media operations are understandable ones.
39. With regard to attributing weight to the public interest in maintaining the exemption, in the Commissioner's view there is a very strong public interest in the defence of the country and its armed forces. In the particular circumstances of this case, the Commissioner considers that the public interest attracts additional weight given that the likelihood of prejudice occurring meets the higher threshold of would rather than simply being likely to. Furthermore, in the Commissioner's view 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.
40. In conclusion, in the Commissioner's view this is a finely balanced case but the partial disclosure of the requested document goes some way to meeting the public interest in disclosure. Whilst it is clearly the case that disclosure of the withheld information would further meet this interest,

⁵ <https://www.theguardian.com/uk-news/2015/sep/07/uk-forces-airstrike-killed-isis-briton-reyaad-khan-syria>

the Commissioner does not believe that such a disclosure is ultimately in the public interest given the widespread prejudicial effects of disclosure on the effectiveness of UK forces. The Commissioner has therefore concluded that the public interest in favour of maintaining the exemption contained at section 26(1)(b) outweighs the public interest in disclosing the information.

Section 23(1) – security bodies

41. The MOD redacted some parts of the JSP900 on the basis of section 23(1) of FOIA. This states that:

'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'

42. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3).⁶ This means that if the requested information falls within this class it is absolutely exempt from disclosure under FOIA. There is no requirement on the public authority to demonstrate that disclosure of the requested information would result in some sort of harm.
43. The complainant argued that the MOD's delayed application of the absolute exemption contained at section 23 raised serious questions as to the handling of his request. He questioned whether section 23 was being relied on to replace section 24(1) of FOIA given that these exemptions are mutually exclusive.
44. The Commissioner has examined the information which the MOD has sought to withhold on the basis of section 23(1) of FOIA and she is satisfied that it was either supplied by, or relates to, the security bodies listed in section 23(3) of FOIA. Such information is therefore exempt from disclosure on the basis of section 23(1) of FOIA. The Commissioner cannot elaborate on this finding without revealing the content of the information which has been withheld on the basis of this exemption.
45. Section 23(1) is an absolute exemption which means that it is not subject to the public interest test.

⁶ A full list of the bodies detailed in section 23(3) is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

Section 40(2) – personal data

46. The MOD withheld the contact telephone number of a MOD employee on the basis of section 40(2) of FOIA. This section provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
47. In this case the relevant condition is contained in section 40(3A)(a)⁷. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
48. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
49. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

50. Section 3(2) of the DPA defines personal data as:

'any information relating to an identified or identifiable living individual'.

51. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
52. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
53. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

⁷ As amended by Schedule 19 Paragraph 58(3) DPA.

54. In the circumstances of this case, the Commissioner is satisfied that an individual's contact telephone number relates to and could be used to identify a particular individual. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
55. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
56. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

57. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

58. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
59. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

60. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child⁸.

⁸ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information,

61. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
62. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

63. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
64. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
65. The MOD explained its policy that names and contact details of officials below the Senior Civil Service should be withheld under section 40(2), unless an individual is in a public facing post and their name and contact details are already in the public domain. It explained that the individual in the particular post does not meet this criteria and therefore their telephone contact number is exempt from disclosure.

Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

66. In the circumstances of this case, for the reasons discussed above, the Commissioner accepts that there is a legitimate interest in the disclosure of information about the UK's targeting policy. However, she is not persuaded that there is a legitimate interest in the disclosure of the contact telephone number of the individual in question.
67. Given this finding the Commissioner has concluded that disclosure of the names would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of the individual's contact telephone number would therefore breach the first data protection principle and thus such information is exempt from disclosure on the basis of section 40(2) of FOIA.

Other exemptions applied by the MOD

68. The Commissioner has concluded that all of the material redacted from the JSP900 is exempt from disclosure on the basis of either sections 26(1)(b), 23(1) or 40(2) of FOIA. In light of this the Commissioner has not considered the MOD's reliance on sections 24(1) and 27(1)(a) of FOIA.

Procedural issues

69. Section 10(1) of FOIA requires a public authority to provide a response to a request promptly and in any event within 20 working days of the request.
70. If the public authority wishes to rely on an exemption to withhold any information then under section 17(1) of FOIA it must issue the requester with a refusal notice, in line with the timescales set out in section 10(1), stating which exemption applies and why.
71. In this case, the complainant submitted his request on 15 October 2018 but the MOD did not provide him with a substantive response until 1 February 2019, at which point it issued a refusal notice citing section 26 of FOIA. Its failure to issue this refusal notice within 20 working days represents a breach of section 17(1) of FOIA. The MOD subsequently relied on additional exemptions, namely sections 23, 24, 27 and 40, which it also failed to issue a refusal notice to the complainant for within 20 working days. This also represents a breach of section 17(1) of FOIA.
72. Finally, as the MOD disclosed some of the requested information to the complainant outside the time period required by section 10(1), it also breached that section of the legislation.

Other matters

73. FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's guidance explains that in most cases an internal review should take no longer than 20 working days, or 40 working days in exceptional circumstances. In this case the MOD took 52 working days to complete its internal review. The Commissioner accepts that this is complex case, but would wish to use this opportunity to emphasise that she expects public authorities to follow the timelines set out in her guidance.

Right of appeal

74. 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@justice.gov.uk

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

75. 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.

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

Signed

Jonathan Slee
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