

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 October 2022

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) seeking information about a UK Reaper strike in Syria in March 2018 in which one civilian was killed. The MOD confirmed that it held information but considered this to be exempt from disclosure on the basis of sections 24(1) (national security), 26(1)(b) (defence), 27(1)(a) (international relations) and 40(2) (personal data) of FOIA. The Commissioner's decision is that the requested information is exempt from disclosure on the basis of the exemptions contained at sections 26(1)(b) and 27(1)(a) and that the public interest favours maintaining both exemptions. The Commissioner has concluded that the names of junior staff are also exempt from disclosure on the basis of section 40(2).
2. No steps are required.

Request and response

3. The complainant submitted the following request to the MOD on 8 February 2021:

'I am writing to apply through the 2000 Freedom of Information Act for information relating to the declared UK drone strike on March 26,

2018, in which a Reaper drone tracked and struck a group of suspected Islamic State fighters in the Syrian Euphrates, destroying their vehicle.

I filed an original request on January 4 but received a response on February 2 saying my request would go over the 600 pound limit. In that reply, the ministry offered to provide advice on refining the request to ensure it was under the limit. I responded the same day requesting advice about which parts of the request I would need to remove in order to be under the limit. A week later I have received no answer and therefore I have removed some parts of my request and am re-filing it. I would appreciate if this request was expedited.

I wish to request:

- All details on the March 26, 2018 strike including close geolocation, time of day and other relevant information.
- All documents assessing civilian harm in the incident.

I include the [original written statement by then Secretary of State for Defence Gavin Williamson](#) confirming one civilian was killed in the strike and have attached the original MoD statement regarding the strike.'

4. The MOD responded on 7 April 2021 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of sections 24 (national security), 26 (defence) and 27 (international relations) of FOIA.
5. The complainant contacted the MOD on 11 May 2021 and asked it to conduct an internal review of this response.
6. The MOD informed him of the outcome of the internal review on 9 June 2021. The review confirmed that all of the information falling within the scope of the request was exempt from disclosure on the basis of sections 24(1), 26(1)(b) and 27(1)(a) of FOIA and that the names of junior officials were exempt from disclosure on the basis of section 40(2) (personal data).

Scope of the case

7. The complainant contacted the Commissioner on 23 June 2021 in order to complain about the MOD's handling of his request. More specifically he challenged the MOD's reliance on the exemptions it had cited to withhold the information in question.

Reasons for decision

Section 26(1)(b) - defence

8. Section 26(1)(b) of FOIA 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.'

9. 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.
- 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 complainant's position

10. The complainant noted that at the time of the statement referred to in his request, the then Secretary of State said that the further details of the incident could not be given due to ongoing operations. However, the complainant argued that the campaign against Islamic State was now largely over and the incident is over three years old and therefore he disputed that further details could not be disclosed due to ongoing operations.
11. The complainant explained that he was willing to accept a version of the withheld information in which sensitive operational information was redacted.
12. He also argued that there was a precedent for releasing similar information about civilian harm caused by drone and airstrikes by the UK and its closest ally, the United States (US).
13. The complainant noted that the US, by far the largest coalition partner during Operation Inherent Resolve, has released extensive details of 341 confirmed civilian casualty incidents since 2014, including exact or close

geolocation and time of strike, as well as details of the target of the attack, and a summary of the civilian harm assessment conducted.¹

14. The complainant argued such disclosures did not appear to have negatively impacted relations with international partners or to have given adversaries an advantage. In fact, the complainant noted that the former chief Coalition spokesman Colonel Myles Caggins said it was an active decision to share such information in the interest of transparency: 'We take every allegation of civilian casualties with the utmost sincerity, concern, and diligence; we see the addition of the geolocations as a testament to transparency'.
15. The complainant also cited the release in the US, in response to an FOIA case, in December 2021 of 1,300 civilian harm assessments by the US-led Coalition which he explained included exactly the sort of information he had requested.²
16. With regard to the UK, the complainant cited the MOD's previous transparency around a 2011 incident, in which a UK drone strike accidentally killed four civilians.³ The complainant explained that chapter five of Peter Lee's book 'Reaper Force - Inside Britain's Drone Wars,' includes detailed testimony relating to that incident, including interviews with those involved. The book states that access to the pilots, who were anonymised, was provided by the MOD. It includes testimony about exactly what happened in that incident operationally, as well as how the pilots felt after realising they had inadvertently killed civilians. The complainant argued that the details in that chapter go far beyond the information sought by his request.

The MOD's position

17. The MOD explained that disclosure of the withheld information would reveal specific operational details including tactics, techniques and procedures (TTP) of the relevant organisations contributing to national security. The MOD explained that information in scope remained operationally sensitive at a time when UK armed forces and coalition allies are continuing to fight Daesh in Iraq and Syria. The MOD explained that disclosure would reveal TTPs and capabilities relevant to current

¹ <https://airwars.org/news-and-investigations/the-credibles-how-airwars-secured-the-most-comprehensive-locational-data-on-civilian-harm-ever-released-by-the-us-military/>

² <https://www.nytimes.com/interactive/2021/us/civilian-casualty-files.html>

³ <https://www.theguardian.com/uk/2011/jul/05/afghanistan-raf-drone-civilian-deaths>

operations and it is likely that similar approaches would be used in future operations.

18. Furthermore, the MOD argued that the information could be used by hostile forces to gain insight into the specific circumstances under which the Reaper platform is tasked to deploy weapons which would risk operational and future capability. Such information could in turn be used by such forces to develop countermeasures or change behaviours in a way that could prejudice the capability and effectiveness of the Reaper platform for the UK and its allies.
19. The MOD explained that it considered the exemption to be engaged at the higher level of 'would' prejudice.
20. The MOD also provided the Commissioner with additional submissions to support its reliance on section 26(1)(b) but such information refers to the content of the withheld information itself and therefore the Commissioner has not referred to such submissions in this notice.
21. However, the Commissioner can confirm that in relation to the possible partial disclosure of information suggested by the complainant, the MOD's position was that following the legitimate use of exemptions no meaningful information was left that could be disclosed.
22. In relation to the precedents for disclosure cited by the complainant, the MOD explained that it could not comment on strikes by other nations or the content of any announcements in relation to such strikes by other nations.
23. With regard to the drone strike of 25 March 2011 cited by the complainant, the MOD explained that the then Parliamentary Under Secretary of State (Minister for the Armed Forces), responded to an MP's question in parliament regarding the strike.⁴ He confirmed that a joint ISAF-Afghan investigation was conducted to establish if any lessons could be learned or if errors in operational procedures could be identified. The report concluded that the actions of the Reaper crew had been in accordance with ISAF procedures and rules of engagement. The MOD noted that the report was to be withheld as its disclosure would, or would be likely to prejudice, the capability, effectiveness, or security of the armed forces.

4

<https://publications.parliament.uk/pa/cm201213/cmhansrd/cm120626/text/120626w0002.htm>

24. Finally, in relation to the book cited by the complainant, the MOD noted that it stated that 'the views and opinions expressed in this book are those of the author alone and should not be taken to represent those of Her Majesty's Government, MOD, HM armed forces or any Government Agency.' The MOD therefore explained that it appeared that the book had not been endorsed by it or HM Government and as result it was unable to comment on its contents.

The Commissioner's position

25. In terms of the first criteria set out above, 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.
26. Furthermore, having considered the content of the withheld information the Commissioner is satisfied that its disclosure would, as the MOD have argued, reveal specific operational details including TTPs of the relevant organisations contributing to national security. The Commissioner is also satisfied that those with hostile intent could use such information to gain insights into the use of Reaper and in turn develop countermeasures or alter their behaviour in a way that could prejudice the capability and effectiveness of the Reaper platform. In addition, the Commissioner accepts that such risk is relevant to both current (at the time of the request) and future operations.
27. In reaching that finding, the Commissioner notes the complainant's arguments about the reduced sensitivity given the passage of time since the incident which is the focus of his request. However, the Commissioner is conscious that at the time of the request (and subsequent to it) the RAF continued to conduct airstrikes in Iraq and Syria against Daesh which involved the use of Reaper aircraft.⁵ In light of this the Commissioner is satisfied that the likelihood of prejudice occurring is one that is more than a hypothetical risk; the second and third criteria are therefore met and the exemption is engaged. The Commissioner is also satisfied that the MOD were correct to argue that the risk of such prejudice occurring is set at the higher level of 'would'.
28. In reaching this finding, the Commissioner wishes to emphasise that he has carefully considered the counter arguments advanced by the complainant. However, it is important to note that the Commissioner's role is limited to assessing whether the specific information that has

⁵ <https://www.gov.uk/government/publications/british-forces-air-strikes-in-iraq-monthly-list/raf-air-strikes-in-iraq-and-syria-january-to-december-2021>

been requested is exempt from disclosure and such an assessment must be taken based on the basis of circumstances of that particular case. Bearing that approach in mind, the Commissioner acknowledges that disclosures by US authorities appear to have provided some similar information to that falling within the scope of the complainant's request. However, the Commissioner does not agree that such disclosures provide a precedent that could or should be followed in this case as such information was disclosed by different bodies, in a different country and as a result under different legislation to the one under consideration here. Regardless of those previous disclosures in another jurisdiction, the Commissioner is satisfied that disclosure of this specific information would be prejudicial to the capability, effectiveness or security of relevant UK forces for the reasons advanced by the MOD.

29. In terms of the availability in the public domain of information regarding the 2011 incident, the Commissioner's position is the same, ie that disclosure of the withheld information in this case would still be prejudicial regardless as to what information may have been released about the previous incident., The Commissioner notes the MOD's point that the book's author stated that the views and opinions in it were his rather than those of the MOD. Moreover, the Commissioner also notes that in response to the Parliamentary Question in 2018, the MOD declined to provide any further details about the incident and it's his understanding that such a position would remain unchanged.
30. Finally, the Commissioner is satisfied that it is not possible to produce a redacted version of the information falling within the scope of the request for the reasons set out by the MOD.

Public interest test

31. 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 favour of disclosing the information

32. The complainant argued that the public interest in disclosure of the information was clear. He noted that the incident had been declared to Parliament as a civilian casualty incident with the then Secretary of State, Gavin Williamson, stating that it was 'deeply regrettable that a UK air strike on 26 March 2018, targeting Daesh fighters in eastern Syria, resulted in an unintentional civilian fatality' and that the UK 'reached this conclusion after undertaking routine and detailed post-strike analysis of all available evidence.' The complainant emphasised that in the entire Operation Inherent Resolve/Operation Shader campaign since 2014, the UK government has made only one such public declaration. As

such, in his view, details about that incident are absolutely of vital interest to the British public.

Public interest in favour of maintaining the exemption

33. The MOD argued that there was a very strong public in withholding information which would provide sensitive operational details about specific military operations.

Balance of the public interest arguments

34. The Commissioner appreciates the gravity of the incident in question. As a result he accepts that there is a significant public interest in the disclosure of information which would inform the public about this incident in question. In the Commissioner's view disclosure of the information would go a considerable way to meeting this public interest. The Commissioner also acknowledges the complainant's position that US authorities have disclosed information about civilian casualties involving its forces and to that extent the UK's approach to such information is one that would be appear to be less transparent.
35. However, the Commissioner agrees with the MOD that there is a very significant public interest in ensuring that the capability, effectiveness or security of UK armed forces are not harmed. In the circumstances of this case, in the Commissioner's view the fact that disclosure of the information would prejudice both current and future operations of the nature covered by the information adds, in his view, further and ultimately compelling, weight to the public interest in favour of maintaining the exemption.
36. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining the exemption.

Section 27 – international relations

37. The MOD also relied on section 27(1)(a) which states that:

'(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... ..(c) the interests of the United Kingdom abroad.'

38. Section 27(1) is a prejudice based exemption and therefore the criteria at paragraph 9 above must be met in order for it to be engaged.

The complainant's position

39. The complainant's position to question the MOD's basis for applying this exemption mirrors the points set out above, namely the lack of

sensitivity of this information given the passage of time and the precedent of similar information being disclosed in the past.

The MOD's position

40. The MOD explained that the relationship that UK armed forces have with its partners in the global coalition against Daesh are built on trust and a general understanding that information relating to military or security activities conducted under that partnership are handled in a confidential and secure manner. The MOD argued that any loss of trust between the UK Government and international partners, or any other allied or partner nation, would negatively impact upon the UK's ability to work together closely on current and future shared defence and security objectives, such as Counter Terrorism and regional stability.
41. With regard to the specific information falling within the scope of this request, the MOD assessed that the release of it would harm relations between the UK and any other allies and partner states. This could inhibit the willingness of the other nations to participate or share information about the deployment of these assets in the future.
42. The MOD provided the Commissioner with additional confidential submissions to support its reliance on section 27(1)(a), but these have not been included in the decision notice.

The Commissioner's position

43. With regard to the criteria at paragraph 9, the Commissioner is satisfied that the first criterion is met as the prejudice envisaged by the MOD is clearly one that is protected by the exemption contained at section 27(1)(a) of FOIA. The Commissioner is also satisfied that there is a causal relationship between the disclosure of the withheld information and prejudice to the UK's relations with partners and allies given the expectation that information about such operations are expected to be treated confidentially. The second criterion is therefore met. Furthermore, having taken into account the content of the information, and the ongoing nature of operations against Daesh, the Commissioner is satisfied that there is more than a hypothetical risk of prejudice occurring. The third criterion is therefore met. The Commissioner is also satisfied that the MOD were correct to argue that the risk of such prejudice occurring is set at the higher level of 'would'.

Public interest test

44. Section 27 is also 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 27(1)(a) outweighs the public interest in disclosing the information.

Public interest in disclosing the information

45. The complainant's public interest arguments for disclosing the information are set out above.

Public interest in favour of maintaining the exemption

46. The MOD argued that it would be firmly against the public interest for the UK's relations with its international partners to be undermined as this would negatively impact upon the UK's ability to work closely together on current and future shared security objectives, such as Counter Terrorism and regional stability.

Balance of the public interest arguments

47. For the reasons set out above, the Commissioner agrees that there is considerable public interest in the disclosure of the withheld information. In the context of section 27, disclosure could provide the public with some insight into how the UK conducts operations with forces from other states.
48. However, the Commissioner agrees with the MOD that it would be clearly against the public interest for the UK's relations with its allies in the context of such operations to be harmed. This is especially the case given that such operations were ongoing at the time of the request. In light of this, and given the underlying importance of maintaining trust between allied armed forces, the Commissioner has concluded that the public interest favours maintaining the exemption.

Section 40 – personal data

49. Section 40(2) of FOIA 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.
50. In this case the relevant condition is contained in section 40(3A)(a)⁶. This applies where the disclosure of the information to any member of
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⁶ As amended by Schedule 19 Paragraph 58(3) DPA.

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 UK General Data Protection Regulation ('UK GDPR').

51. 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 the FOIA cannot apply.
52. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

54. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
55. 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.
56. 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.
57. In the circumstances of this case, the Commissioner is satisfied that the names of the junior officials both relate to and identify the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
58. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
59. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

61. 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.
62. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

63. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that 'processing shall be lawful only if and to the extent that at least one of the' lawful bases for processing listed in the Article applies.

64. 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 child'⁷.

65. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

⁷ 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

'In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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'.

- 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.

66. 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

67. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

68. 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 this subject. However, he is not persuaded that there is a particularly strong or compelling interest in the disclosure of the names of junior officials.

Is disclosure necessary?

69. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

70. In the Commissioner's view it is not sustainable to argue that disclosure of the personal data the MOD is seeking to withhold is necessary; disclosure of such information would not add to the public's understanding of this subject matter in any notable way.

71. Given this finding the Commissioner has concluded that disclosure of the names would not be lawful and therefore article 6(1)(f) of the UK GDPR is not met. Disclosure of the names of junior officials 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.

Right of appeal

72. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

73. 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.

74. 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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