

**IN THE FIRST TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
INFORMATION RIGHTS
BETWEEN:**

APPEAL REFERENCE: EA/2016/0290

CHRIS COLE

Appellant

- and -

INFORMATION COMMISSIONER

Respondent

- and -

THE MINISTRY OF DEFENCE

Second Respondent

APPELLANT'S SKELETON ARGUMENT
for hearing 11 and 12 July 2017

Unless otherwise stated, references to page numbers refer to the Open Bundle

Introduction

1. This appeal concerns a request for information made under the Freedom of Information Act 2000 (FOIA). The substance of the request is set out in the decision notice of the First Respondent ("the IC"): FS50634580 (at pp1-9). The request sought information relating to the use by the UK of its Reaper Unmanned Aerial Vehicles (UAVs), commonly known as 'drones'.
2. The Second Respondent ('The MoD'), relying on sections 26 (1)(b) and 27 of the FoIA refused to disclose:

- i) How many RAF Reaper UAVs are engaged in operations against ISIL/Daesh in Iraq and Syria at today's date (1 March 2016)?
 - ii) 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?
 - iii) 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 Appellant sought an internal review, the outcome of which supported the initial decision. The Appellant thereafter lodged a complaint with the IC (pp46-53) challenging the decision to withhold information related to the first and second part of the request. The Appellant did not pursue an appeal against the refusal of the third part of the request in order that the issue at hand would be more clearly focused.
4. Three issues that arise are:
 - i) Whether, pursuant to section 26(1)(b) FOIA, disclosure of the information *"would, or would be likely to, prejudice the capability effectiveness or security of any relevant forces."*
 - ii) Whether, pursuant to section 27 FOIA, disclosure of the information *"would, or would be likely to, prejudice (a) relations between the United Kingdom and any other State"*
 - iii) Whether, the public interest in maintaining the exemption outweighs the public interest in disclosing the information" (FOIA, section (2)(2)(b))
5. The IC upheld the decision of the MoD, although only on the basis of section 26(1)(b), making no finding at all on section 27. Before this Tribunal, the MoD maintains its reliance on section 27 (§§12-13, p32). The IC agreed with the MoD that the public interest balance did not favour disclosure.

6. The jurisdiction of the Tribunal is to examine whether the notices of the IC's decision is in accordance with the law, or any discretion ought to have been exercised differently. The Tribunal may review "any finding of fact on which the notice in question" is based (FOIA, section 58). In substance, the three issues as set out above are for the Tribunal to determine for itself in the light of the evidence.

The closed material

7. The Appellant is aware that there is a 'closed bundle' of material. The Appellant does not contest that a closed material procedure is appropriate in the circumstances of this appeal.
8. As explained in the Tribunal's practice note, the law permits deviation from the normal rule of open and public hearings but only so far as is necessary. An application is required by the party seeking to keep the material in closed; it must be in writing and with reasons. In respect of the disputed information, it is sufficient to say that the Tribunal needs to see it in order to evaluate the evidence properly, but "in the case of other material, greater explanation may be required." That application is an important opportunity for the judge to consider what material is in closed and to limit non-disclosure to what is necessary. As suggested in the practice note, "it may be possible to edit a document so that at least some of it is disclosed even though some has to be withheld." Moreover, it may be possible by providing an index to the closed bundle "to give any idea of what material has been withheld." These are important safeguards.
9. From correspondence included in the open bundle (see pp 61- 62) it appears that as well as the disputed information, there is a 'MoD PIT Submissions' document and an un-redacted version of the witness statement of Group Captain Mark Flewin.
10. The Appellant seeks confirmation: (a) that reasons have been given by the MoD as to why the closed material ought to be in closed; (b) whether the Appellant can be provided with an index to the closed bundle; and (c) that the Tribunal has considered whether any of the material in the closed bundle ought to be in open, including whether it may be possible to provide some documents with redactions, or whether a summary or gist of any or all the documents may be made available.

11. Given that Section 23 or 24 not been raised in response to the requested information, it is assumed that arguments raised in the closed bundle do not relate in any way to issues that could be covered by those sections. If that assumption is incorrect, it should be disclosed to the Appellant.

Part A: The number of Reaper UAVs deployed on Operation Shader ('numbers')

Section 26 (1)(b)

12. The usual principles identified in Hogan v IC and Oxford City Council [2011] 1 Info LR 588 apply. Thus, "relevant prejudice is prejudice that is real, actual or of substance; the exemption is engaged if disclosure is more likely than not to cause such prejudice, or if there is a very significant and weighty chance of it, even if falling short of being more probable than not": Muttit v IC and Cabinet Office (EA/2011/0036).
13. The MoD argued in its internal review that the requested information was exempt under S26 as the requested information 'would, or would be likely to, prejudice the capability effectiveness or security of any relevant forces'. The reviewer judged that the level of prejudice was at the lower level of 'would be likely'. The reviewer argued that release of the information "would be likely to assist opposing forces in building up a detailed picture of UK tactics and strike capabilities." From this, the reviewer goes on, "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." (§7, p44)
14. The reviewer argued that there were also "specific factors" for not releasing, information in relation to the second and third parts of the request which meet the criteria of 17(4) (§7, p44). As the third part of the information request is no longer being pursued, it should be noted that there are only 'specific factors' relating to the second part ('location') and not the first part ('numbers').
15. It is presumed that the 'specific factors' relating to the second part ('locations') are part of the "more detailed submissions" made to the IC (§10, p4 & §12, p5) and form

part of the closed bundle. The Appellant is reliant on the Tribunal in examining thoroughly the reasons provided in the closed bundle.

16. In any event, the Appellant does not accept that there can be “a very significant or weighty” chance of the envisaged prejudice.
17. Firstly, the MoD is happy to detail both the number and the location of other UK aircraft engaged in operations against ISIS without concern about, or actual prejudice occurring, as detailed in the Appellants witness statement (§42, p75 & pp88-91). The MoD’s own press release of 5 December 2015, detailing Michael Fallon’s visit to RAF Akrotiri in Cyprus states:

“Two Tornados joined the existing eight earlier this week and six Typhoon aircraft were introduced to more than double Britain's strike capability with missions. Defence Secretary Michael Fallon said:

‘The deployment of Typhoons and two further Tornados will double the number of British fighter jets taking the fight to Daesh. Together with extension of our operations to Syria, that will mean we hit these brutal terrorists harder in their heartland.’” (pp90-91)

18. Secondly, the MoD have previously detailed the number of UK Reapers deployed (on Operation Herrick in Afghanistan) as well as their location (Kandahar) without concern about, or actual prejudice occurring, as again detailed in the Appellants witness statement (see §43, p75 & pp92-98).
19. In response to the Appellant’s letter to the Secretary of State of 21 January 2015 (p110) asking why such details could be released in relation to operations in Afghanistan, but not in Iraq and Syria, the MoD replied on 2 March 2015:

“In Afghanistan there were a large number of air assets contributing to the overall ISAF mission. Given this we were able to release information on UK Reaper assets as this did not compromise capabilities by giving an indication of the level and area of coverage...” (p112)

20. This confirms that the MoD judges that such details can be released without it necessarily causing prejudice of the kind suggested. It should be noted that there are

at least as many aircraft operating over Iraq and Syria since January 2015 as there were operating in Afghanistan when the MoD felt able to release details of the number of Reapers deployed.

21. Thirdly, while the MoD argue that releasing the requested information “would be likely to assist opposing forces in building up a detailed picture of UK tactics and strike capabilities” they have regularly released, on approximately a weekly-fortnightly basis, updates on the use of Reapers, Tornados and Typhoons against ISIS in Iraq and Syria which include details of surveillance operations and air strikes including targets and locations (see <https://www.gov.uk/government/news/update-air-strikes-against-daesh>). This, it could be argued, gives far more insight to UK operations than the number of Reapers deployed.
22. Fourthly, the MoD regularly releases data, in response to my FoI requests, on UK air operations against ISIS, including monthly numbers of missions, monthly numbers of sorties with weapons releases, monthly number of air strikes, as well as number of weapon released and type of weapons used (all of these broken down between Reaper, Tornado and Typhoon). An example of the type of data released on an approximately quarterly basis can be seen at pp 84-87.
23. From this data it can clearly be seen that there are on average 2-3 sorties per day by UK Reapers (see table below). It is clear by releasing this information that the MoD does not perceive any prejudice arising from such information being made public, nor has any actually arisen.

UK armed aircraft missions against ISIS, 2014 – 2016 (compiled from FoI responses from MoD)

	Reaper Missions Flown Iraq	Reaper Missions Flown Syria	Total Reaper Missions	Tornado Missions Flown Iraq	Tornado Missions Flown Syria	Total Tornado Missions	Typhoon Missions Flown Iraq	Typhoon Missions Flown Syria	Total Typhoon Missions
2014 (Oct-Dec)	107	10	117	164	0	164	0	0	0
2015	643	247	890	581	15	596	37	10	47
2016	403	287	690	431	133	564	473	37	510

Note for Reaper missions there is one sortie per missions, for Typhoon and Tornado missions there are two sorties per mission as the aircraft fly in pairs. See <https://dronewars.net/uk-drone-strike-list-2/> and www.dronewar.net/foi

24. There is, therefore, publicly available, a large amount of information regarding UK air operations against ISIS which has not caused prejudice. It is difficult to see how

releasing the number of Reapers deployed against ISIS could create real or actual prejudice of substance. In light of this, the Appellant submits that the MoD cannot show the required level and likelihood of prejudice for Section 26 exemption to apply.

25. In its response to the appeal, the Second Respondent (the Ministry of Defence) argues that the first part of my information request “seeks information concerning a specific date, and the conduct or otherwise of strikes on that particular date” (p32). This is not the case. The first part of my information request seeks the number of Reaper UAVs, out of a known fleet of ten, deployed on operations against ISIS on the date of my information request.
26. If the refusal of the information is related to concerns about giving such information narrowed down to one particular date, the Appellant would be willing to accept information related to deployment of Reapers to a particular month if that would be helpful.

Section 27 (1)(a)

27. In its internal review, the MoD argued that both section 26 (defence) and section 27 (international relations) exemptions were applied to Part A (‘numbers’) and Part B (‘locations’). There is, however, little detail either in the original response or the internal review on how and why Section 27 (1)(a) applies to either part.
28. The internal reviewer states that there are ‘specific factors’ which meet the criteria of 17(4) and therefore have been withheld from the Appellant. These factors could include detail of the prejudice to international relations, however the internal review states that the ‘specific factors’ do not relate to Part A. (‘numbers’).
29. In the Decision Notice, the IC simply states that she has not examined the MoD’s reliance on section 27(1)(b) (§24, p8).
30. The Appellant highlighted, in its appeal to the Information Commissioner (IC), that there was little detail about how section 27 applied to the information requested. The Appellant sought assurance from the IC that the MoD had properly ascertained whether the foreign State(s) concerned had been approached and asked whether they

objected to the release of the information. (§9, p52). It is not clear if this was done by the IC.

31. Importantly, whilst any expressed view of a foreign partner will inevitably be a relevant factor, it certainly does not follow that there will be the requisite prejudice to relations with the foreign partner. Plainly, the MoD must demonstrate how and why the disclosure of the requested information, ('numbers') falls not in the category of disagreements or differences in approach which arise in the ordinary course of foreign relations and which such relations readily survive, but causes to those relations real or actual prejudice of substance.
32. The Appellant questions whether in regard to Part A ('numbers'), section 27 exemption adds very much to section 26. If the Appellant is right that no real or actual prejudice of substance would likely be caused to the operational effectiveness of armed forces by disclosure of the requested information in Part A, then it follows that any harm caused to international relations must be limited.

Part B: At which bases are the UK's Reaper fleet deployed ('locations')

Section 26 (1)(b)

33. As with Part A, the MoD argued in its internal review that the information requested in Part B ('locations') was exempt under S26 as the requested information 'would be likely to, prejudice the capability effectiveness or security of any relevant forces'. It went on to state:

"There is a degree of sensitivity about the number of UAVs, including Reaper, which form part of UK Forces' wider air capability, their basing and deployment involved in current operations." (p44)

34. The MoD judged the level of prejudice in relation to Section 26 for Part B ('locations') at the lower level of 'would be likely to' (p44). The Appellant however, questions the application of section 26.
35. It is hard to understand how and why there is likely to be prejudice from releasing the information about the location of Reapers engaged in operations against ISIS, when

the location of Reapers engaged in operations against the Taliban were given without any perceived or actual risk occurring (pp92 – 98).

36. It is also hard to understand how and why there is likely to be prejudice from releasing the information about the location of unmanned aircraft engaged in operations against ISIS, when the location of manned aircraft engaged in operations against ISIS are given without any perceived or actual risk occurring (see para. 17 above).
37. As outlined in the Appellants witness statement, numerous mainstream media organisations, as well as specialist defence press, have named Ali Al Salem air base in Kuwait as the location of at least some, if not all, of the UK's Reapers, although some note this has not been confirmed (§45, p76-77).
38. In addition, media visits arranged by the MoD have led to press reports containing enough information to easily identify the base as Ali Al Salem although it was not directly named. (pp75-76, 100-109)
39. In his witness statement, Group Captain Mark Flewin, refers to 'the green book' which sets out the MoD's procedure on operational security in relation to media reporting (§21, p120). That document clearly acknowledges that decisions about what may or may not impact on security are matters of judgement. At paragraph 49 it states:

“The MoD recognises that views on what is and what is not of security value are subjective and that individual checking officers may apply different judgements.”

40. Given that such information about the location of UK Reapers already exists in the public domain, it is unclear, how prejudice perceived under section 26 would be likely to arise from releasing the requested information.

Section 27 (1)(a)

41. It is presumed that the 'specific factors' mentioned by the internal reviewer, which cannot be disclosed under 17(4) and that apply solely to Part B ('locations') relate to possible prejudice to international relations and form part of the closed bundle. The

Appellant is reliant on the Tribunal examining thoroughly the reasons provided in the closed Bundle.

42. As outlined above (para. 25-27) it is not at all clear to the Appellant if the MoD ascertained that the information requested would cause prejudice to international relations with specific a specific State of States, and whether that prejudice was of the requisite level, as outlined above. Again it appears that the IC did not examine this aspect at all.

Public Interest

43. The Appellant argues that even if it is considered that either or both the section 26 or 27 exemptions apply, disclosure ought nevertheless be made pursuant to section 2(2)(b) FOIA on the basis that it has not been shown that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
44. As the Tribunal has confirmed in *Cabinet Office v IC and Lamb* [2011] 1 Info LR 782, *"those arguing for disclosure therefore have a slight advantage in that they do not have to show that the factors in favour of disclosure exceed those in favour of maintaining the exemption. They only have to show that they are equal"* (§34).
45. Importantly, the Tribunal has cautioned against qualified exemptions being treated as de facto absolute ones. Where the public authority relies on a qualified exemption subject to the public interest test, there is no guarantee that information will not be disclosed, however strong the public interest in maintaining the exemption: *Plowden and FCO v IC EA/2011/0225 and 0228* at §32.
46. Here there is a significant public interest in the MoD being transparent in its use of UAVs. The IC acknowledges the public interest in disclosure of information about the use of UAVs which "would inform and further a public debate about the use of such weapons by UK armed forces." (§22, p7). It is important, however, to look at the extent, nature and weight of the overall public interest in favour of disclosure.
47. The Appellant focuses on (a) the general public interest in transparency in the use of UAVs and (b) the particular public interest in the requested information.

The general public interest

48. The Appellant has addressed the general public interest in transparency on the use of armed UAVs in his witness statement to this Tribunal (pp69-74). In this regard the statement highlights:
1. The particular capabilities of armed UAVs (§§17-21).
 2. The role of armed UAVs in enabling military intervention and the concern that they can lower the threshold for the use of armed force, eroding the principle that armed force should only be used as a last resort (§§22-30).
 3. The role of UAVs in the expansion of 'targeted killing' particularly outside of armed conflict and not in response to a direct and imminent threat to life (§§31-38).
49. There is also considerable uncertainty as to the legality of certain uses of armed UAVs and the way in which new technology is challenging norms of domestic and international law which regulate the use of force. Those concerns have been expressed last year by the parliamentary Joint Human Rights Committee, which argued that the government's legal justification for the drone targeted killing beyond the battlefield was "confused and confusing."¹ These issues are all of considerable and weighty public interest.

The particular public interest in the requested information

50. The Appellant submits that the IC did not give proper weight to the public interest in favour of disclosure. In the Decision Notice, the IC states she took into account the public interest in favour of releasing the requested information only in so far as it would "inform and further a public debate" about their use, but does not take into account the much weightier aspects of public interest in favour of disclosure raised by the Appellant in his appeal (§§ 12-16, p53).

¹ See Drone killings: Legal case 'needs clarifying', BBC News, 10 May 2016, <http://www.bbc.co.uk/news/uk-36253518>. Full JHR Committee report: 'The Government's policy on the use of drones for targeted killing' <https://www.publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>

51. There is considerable national and international concern about the use of armed drones, particularly for targeted killing outside the situation of international humanitarian law (IHL), as well as the way the technology appears to be lowering the threshold for use of armed force as summarised above (para 43), and described in the -Appellants witness statement (§§17-38, pp69-74).
52. There is therefore weighty public interest in having proper and appropriate transparency about their deployment in order to enable parliamentary and public oversight of these systems. A basic aspect of this would be to release at least *the same level of detail* about their deployment, as has been released about the UK's other armed aircraft engaged in operations against ISIS.
53. Without disclosure of the requested information, it is not possible for parliament or the public to be assured that these systems, which raise particular and important ethical and legal questions, are being used in accordance with international legal norms and international standards of good governance.
54. Transparency on the deployment of these systems would also be in the public interest as it would help dispel suggestions that they are being utilised unlawfully. Secrecy about the number deployed and their location will only breed rumour and disinformation about UK military and counter-terrorism operations which would be counter to the public interest. Releasing the requested information then, would be an important counter-weight to any suggestion that the UK's Reaper drones are being used outside of international law norms and an important safeguard of the UK's international reputation.

Balance of interest, related to three possible circumstances

55. Both Respondents as well as the Tribunal have seen the requested information as well as the Second Respondent's closed PIT document. Without sight of this, the Appellant is somewhat disadvantaged in putting forward arguments on the balance of public interest other than in the general way above. There appears to be three likely scenarios related to the deployment of armed drones and their location. Each would give rise to slightly different balance of interest tests, and despite this being somewhat

speculative, the Appellant would like to summarise the arguments in favour of information release based on what may be the circumstances.

Scenario One: All ten UK Reapers deployed on operations against ISIS in Iraq and Syria, located in Kuwait (and possibly elsewhere)

56. Part A: ‘numbers’: The Appellant says that Section 26 is not met as no real prejudice of substance has been demonstrated, as can be seen by the release of the same information (‘numbers’) about UK’s manned aircraft without prejudice, and about previous Reaper deployments
57. Public Interest Test: The Appellant argues that the public interest favours disclosure of ‘numbers’ as it gives appropriate oversight over deployment of this contentious technology, dispels concerns that they being used elsewhere, and sets an important benchmark internationally for transparency over deployment of armed drones.
58. Part B: ‘location’: Section 26 is not met as no prejudice has arisen from the naming of the base where UK Reapers are launched on multiple occasions in national and international media. With regard to Section 27, it is not clear if the UK has approached the State(s) concerned or is just summarising prejudice. It states there are ‘specific factors’ which have not been disclosed in open.
59. Public Interest Test: The Tribunal will judge for itself the level of prejudice under Section 27 given its sight of the ‘specific factors’ brought to its attention by the Second Respondent and whether, given the naming of the base multiple times in the media, this is still at issue. The Appellant believes that the public interest lies in disclosure unless there is weighty prejudice shown.

Scenario Two: Some UK Reapers deployed on operations against ISIS in Iraq and Syria, located in Kuwait (and possibly elsewhere), with some UK Reapers deployed on operations outside of Iraq and Syria, deployed at unknown location

60. The Appellant relies on arguments made under Scenario One (above). In addition, if UK Reapers were/are engaged on operations outside of Iraq and Syria, there is a very weighty public interest in disclosing the numbers of reapers that are engaged in Operation Shader. Given the acceptance of the convention that parliament is entitled

to approve military action, and given the specific concerns about these systems, there is weighty public interest in disclosure of their location. If it is judged that the specific location of the base cannot be given due to security concerns, then the location should be given by country or perhaps region. If operations are ongoing outside of Iraq and Syria, and the location of these Reaper operations are the same as used for operations in Iraq and Syria (or the same country or region) it should be clearly indicated.

Scenario Three: Some UK Reapers deployed on operations against ISIS in Iraq and Syria, located in Kuwait (and possibly elsewhere), with some UK Reapers in storage within the UK

61. The Appellant relies on public interest arguments outlined under Scenario One (above). In addition there is significant public interest in disclosure if, in fact, some of the UK's Reaper fleet were/are in storage. UK Reapers will be/will have been in storage almost certainly due to there being insufficient RAF crew to operate all of the UK's fleet of ten Reapers. There have been indications by both the USAF and RAF that workload pressure are impacting on recruitment and retention of Reaper pilots.
62. In addition there would be significant public interest in disclosure given that the UK signed initial contracts in December 2016 to procure up to twenty-six additional armed UAVs. Expenditure on these additional armed UAVs could be worth up to \$1billion according to defence experts.² If the UK is unable to staff its current fleet, it would be a serious and significant matter of public interest if funding has been expended to increase the number of armed drones while the current ones could not be flown.

Conclusion

63. Until recently the UK was one of only three states (UK, US, Israel) to have used armed drones outside of its own territory. Over the past 18 months several other nations including Turkey, Iran and UAE have also begun to launch strikes across their borders using armed drones. It is highly likely that over the next few years many

² Gareth Jennings, UK commits development funding for Protector UAV, Janes Defence Review, 5 December 2016, <http://www.janes.com/article/65983/uk-commits-development-funding-for-protector-uav>

other nations will follow suit as this technology proliferates. The Appellant believes that it is in the public interest that there are standards set internationally for transparency and public oversight over the deployment of these systems for reasons set out. It is in the public interest that the UK sets a benchmark for such transparency and oversight by being at least as transparent about the deployment of these systems as it is for manned armed aircraft.

64. This appeal raises the familiar dichotomy that in an area in which the State feels most compelled to act with secrecy, the need for transparency and public scrutiny can be at its highest. The ethical and legal concerns about the impact of armed drones, including now they appear to be lowering the threshold for the use of force and expanding the use of ‘targeted killing’, mean that it is in the public interest that there is transparency on the deployment of these systems. It is of great public interest that parliament and the public should have confidence that the use of force by its armed forces complies fully with international law as well as with government’s publicly expressed policies.

Relief

65. The Appellant invites the Tribunal to substitute the notice under appeal with its own, making a finding that the requested information in Part A and/or Part B is required to be disclosed.

Chris Cole
4 July 2017