

BETWEEN:-

CHRIS COLE

Appellant

- and -

(1) THE INFORMATION COMMISSIONER

(2) MINISTRY OF DEFENCE

Respondents

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OPEN SKELETON ARGUMENT OF THE MINISTRY OF DEFENCE

For the Hearing listed on 11-12 July 2017

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*Reference to pages in the Appeal Bundle are in the form: [p.x].*

*References to the Freedom of Information Act 2000 are in the form "FOIA".*

**Introduction**

1. The Ministry of Defence ("MoD") provides this skeleton argument in support of its Response of 7 March 2017 [pp.30-33] and the Commissioner's Decision Notice issued on 8 November 2016 [pp.1-9], opposing the Notice of Appeal dated 5 December 2016 [pp.17-19]. This skeleton argument contains only the arguments which can be made in open. The Tribunal and parties will appreciate that the nature of the information in issue means that it will also be necessary to make oral submissions, and provide some evidence, in closed session at the hearing. The MoD does not intend to file a closed skeleton argument; it will make closed arguments orally.
2. The MoD submits that this appeal should be dismissed. The information requested (to which this appeal relates) is exempt from disclosure by virtue of sections 26(1)(b) and 27(1)(a) FOIA.

## The Position in Summary

3. The Appellant's request was made on 1 March 2016 [p.38] for three categories of information, only two of which are now pursued. Those two elements of the request are:

*"a) How many RAF Reaper UAVs are engaged in operations against ISIL/Daesh in Iraq and Syria at today's date (1<sup>st</sup> March 2016)? [Part A]*

*b) At which bases are the UK's Reaper fleet currently deployed to at today's date (1<sup>st</sup> March 2016)? If you do not wish to give the exact location for security reasons, please can you detail their local by country." [Part B]*

4. Both Parts A and B concern unmanned aerial vehicles ("UAVs"), or remotely piloted air systems ("RPAS"); commonly known as 'drones'. Reaper UAVs are piloted remotely by RAF personnel in military bases in the UK and the USA. The UAVs themselves may take off and land from overseas bases, regardless of where the pilots are situated, depending on the operational deployment. Reaper UAVs conduct intelligence gathering and surveillance flights, but can also carry out missile strikes when appropriately armed and authorised to do so: W/S Flewin at §§6-7 [p.115].
5. There is no dispute, and it is in the public domain, that the UK has deployed Reaper UAVs in both their surveillance and strike capacities in the military action against Daesh in both Iraq and Syria. The House of Commons authorised military action against Daesh in Iraq on 26 September 2014 and in Syria on 2 December 2015, following lengthy debates. The current deployment of Reaper UAVs against Daesh is taking place in exercise of the Crown's prerogative powers, and as a result of that Parliamentary approval.
6. The MoD applies both sections 26(1)(b) and 27(1)(a) to both parts of the request. It did so both in its original response of 31 March 2016 [pp.39-40] and in its internal review response of 9 June 2016 [pp.42-45].
7. In relation to Part A, the MoD considers that the relevant prejudices would be likely to occur if the requested information were to be disclosed, in respect of both provisions.

8. In relation to Part B, the MoD considers that the relevant prejudices would, or alternatively would be likely to, occur if the requested information were to be disclosed, in respect of both provisions.
9. The MoD notes at the outset the lengthy statement of Mr Cole [pp.66-79]. It has no objection to the admission of that statement. It may be more accurate to describe it as Mr Cole's argument, and it will be addressed here where necessary. It is not necessary to cross-examine Mr Cole; his points can be addressed in submissions. For obvious reasons, the MoD is not in a position to be able to respond to each and every assertion about the use of drones or the inferences Mr Cole has drawn.

### Sections 26 and 27 FOIA

10. Section 26 FOIA provides a qualified exemption from disclosure in the following terms:

*"(1) 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.*

*(2) In subsection (1)(b) "relevant forces" means –  
(a) the armed forces of the Crown, and  
(b) any forces co-operating with those forces,  
or any part of those forces."*

11. Section 27(1) FOIA provides a qualified exemption from disclosure in the following terms:

*"(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"*

12. The usual well-known analysis in this jurisdiction for determining whether prejudice is relevantly likely applies.

13. The application of the prejudice test in the context of both sections will often occur in the context of a risk of a detrimental effect, rather than quantifiable damage. The Tribunal held, applying section 27(1) in *Gilby v Information Commissioner & the Foreign and Commonwealth Office* (EA/2007/0071) at §23, that a risk of this type was sufficient:

*“prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the [Kingdom of Saudi Arabia] or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty. The prejudice would lie in the exposure and vulnerability to that risk. Similar considerations would apply to the effect on relations between the UK and the KSA”.*

14. Risks to matters such as national security, defence and international relations are invariably areas about which the public authority will have much greater expertise than the Commissioner or the Tribunal, and weight should be given to the considered view of the public authority: *APPGER v Information Commissioner & Ministry of Defence* [2011] UKUT 153 (AAC); [2011] 2 Info LR 75 at §56:

*“There are essentially two issues:*

- i) would disclosure of the information be likely to prejudice international relations;*
- ii) if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing it.*

*Both matters are for the Tribunal to determine for itself in the light of the evidence. Appropriate weight needs to be attached to evidence from the executive branch of government about the prejudice likely to be caused to particular relations by disclosure of particular information: see Secretary of State for the Home Department v Rehman [2001] UKHL 47; [2003] 1 AC 153, [50]-[53] and see also R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65 at [131] per Master of the Rolls:*

*‘In practical terms, the Foreign Secretary has unrestricted access to full and open advice from his experienced advisers, both in the Foreign Office and the intelligence services. He is accordingly far better informed, as well as having far more relevant experience, than any judge, for the purpose of assessing the likely attitude and actions of foreign intelligence services as a result of the publication of the redacted paragraphs, and the consequences of any such actions so far as the prevention of terrorism in this country is concerned.’”*

15. See too *Savic v Information Commissioner, Attorney General's Office and Cabinet Office* [2016] UKUT 535 (AAC) at §116, reiterating and approving that analysis, and *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] AC 945, where Lord Neuberger observed at §75 that: “the Foreign Office is the best equipped organ of the state to assess the likely reactions of a volatile foreign government and people, and while it would be an overstatement to say that a domestic court is the worst, it is something of an understatement to say that it is less well-equipped to make such an assessment than the Foreign Office.” (See also §46 and §§70-71). The Tribunal is encouraged to consider the headnote and passages cited of *Lord Carlile* in advance of the hearing.
16. The Upper Tribunal in *Savic* also noted that it “must be remembered that what is relevant is an assessment of those reactions rather than the validity of the reasons for them looked at through ‘English or any other eyes’”: at §116.

### **The Engagement of the Exemptions**

17. Much of the basis for the engagement of sections 26(1)(b) and 27(1)(a) cannot be addressed in open submissions. The closed statement of Group Captain Mark Flewin addresses these points in more detail. Group Captain Flewin is an extremely experienced witness in defence matters, including specifically in the work of the RAF, operational activities, the military campaigns against Daesh, and in the use of drones: W/S Flewin at §§1-3 [pp.113-114]. Applying the case law set out above, the Tribunal should afford that evidence considerable weight.
18. In summary, release of the information in Part A would be likely to assist opposing forces (particularly but not necessarily exclusively Daesh) to build up a more detailed picture of UK military tactics and strike capabilities. Part A seeks information concerning a specific date. Placed together with information otherwise available to hostile forces - including in relation to military activity of other allied armed forces - efforts, training, tactic and planning activities could be adjusted to exploit likely use, or perceived limitations, of the military operations of both the UK and allies. Daesh in particular is a particular ferocious and desperate enemy: W/S Flewin at §§11-16 [pp.116-119] (including in closed). Any actual or perceived impact

on the military capabilities of allied forces would, unsurprisingly, pose international relations concerns.

19. It is also important to note that the MoD does publish information online (including in relation to specific dates, such as 1 March 2016) about airstrikes against Daesh: W/S Flewin at §16 [p.118]. This is the sort of information which can be pieced together with the specifics of the UK's UAV capabilities. The MoD has carefully balanced what it can and cannot release without risking harm to those capabilities and those of its allies: W/S Flewin at §16.
20. The likely impact on the UK's military operations, and those of allied States, engages section 26(1)(b), and the related likely impact on the military operations of allied States also engages section 27(1)(a). There are also closed section 27(1)(a) concerns: W/S Flewin at §14 (closed).
21. Mr Cole emphasises a distinction between not releasing the number which answers Part A, and the MoD's willingness to give the number of Reapers engaged in earlier operations against the Taliban in Afghanistan [p.92]. But the MoD has already explained to him the difference:

*"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. As we drew down in Afghanistan, disclosing the capability in each location could have disclosed potential capability gaps which could have compromised security; this is when the UK ceased to release this information.*

*On Op SHADER, releasing the location of UK Reapers could disclose capability gaps and compromise security. Furthermore, for the protection of the other nations involved, the UK does not divulge their location" [p.112].*

These are materially the same points as the MoD makes now.

22. Release of the information in Part B of the request would prejudice both relations between the UK and other States, and would prejudice the UK's military operations, for the same (or materially) equivalent reasons. Both sections 26(1)(b) and 27(1)(a) are again engaged.

23. As to Part B, Mr Cole places some emphasis at §§44-45 of his statement [pp.75-76], on speculation or inferences made as to 'a' or 'the' possible answer to Part B. The MoD neither confirms nor denies that speculation. It notes, and reiterates, the various quoted reports which mention that there has been no official confirmation of the location of the Reapers being deployed. That is right: there has been no official confirmation. The press coverage which Mr Cole exhibits specifically notes that the location is "*undisclosed*" (Daily Signal [p.106]), "*secret*" (The Sun [p.100]) and, separately, that the US military has also refused to release "*the locations and other details about the units and aircraft involved to avoid embarrassing partners in the region*" (Washington Post [p.102]).
24. The MoD also draws the Tribunal's attention to the fact that the press visit to the undisclosed location, on which Mr Cole relies, was the subject of reports in early May 2016, after both the request and the response of the MoD.
25. The necessarily closed evidence of Group Captain Flewin in this respect is absolutely clear: W/S Flewin at §§17-23 [pp.119-121] (open and closed).

### **The Public Interest Balance**

26. The MoD does not dispute that there is a significant specific public interest in the use by it of UAVs and in the conduct of military operations against Daesh, in general terms. Nor does it dispute the public interest in the topic areas raised by Mr Cole in his statement: the threshold for the use of armed force and the use of UAVs in targeted strikes (see at §21 of his statement [pp.69-70]).
27. However, the requested information adds nothing of substance to any of those debates, which can and do proceed with great force and detail. The provision of a specific number on a specific date - Part A - contributes nothing of any value to a general debate about UAVs or their use. It is not suggested by Mr Cole that any particular action was taken on 1 March 2016 which specifically raises the public interest level, and there is no dispute that the UK has some Reaper capacity engaged against Daesh.

28. There is, in the abstract, a marginally higher public interest in the location(s) from which those UAVs are deployed because, the MoD accepts, it may be of some relevance to the wider debate on the military campaign to know the States which form part of the coalition taking action, including by permitting the use of their territory and airspace in this respect. But even in this context, Part B does not remotely address the particular matters Mr Cole emphasises.
29. Although some emphasis has been placed by Mr Cole on the need for Parliamentary oversight and involvement, that is to fundamentally overlook that the context of the request is that any military action taken on 1 March 2016, by the UK's Reaper fleet against Daesh in Iraq or Syria, has already been the subject of Parliamentary authorisation. There is absolutely no principle – and no serious suggestion of it – that Parliament must approve every individual sortie or the use of individual pieces of equipment. This is already clear: [p.78 at §54].
30. There is no specific public interest which favours disclosure of Part A or B.
31. The general interests in transparency and accountability are accepted also to be weighty, but they are outweighed here.
32. There is an indisputable and vital importance in effective military operations against Daesh, given the closely related effect on civilian and coalition military lives at risk from Daesh and their actions. The avoidance of prejudice to the armed forces of the Crown and of allied forces, as well as the maintenance of international relations (particularly in the context of combatting the military and terror threat posed by Daesh), carry obvious and extremely weighty public interest. It is highly unlikely to be in the public interest to risk prejudicing effective military operations against Daesh, and thereby risking the lives of civilians and allied military personnel in their path. To the extent that it is necessary to do so, the MoD relies on the well-established principle in this jurisdiction (particularly in the context of national security and health and safety concerns) that even a small but significant risk of extremely serious harm amounts to a very weighty public interest factor.
33. Furthermore, Mr Cole evidences at some length in his statement and exhibits the attempts on the part of the MoD to provide appropriate information at appropriate



points to enable a balanced debate, whilst preserving operational security, which has reflected different operational needs at different times and in different contexts. The MoD encourages the Tribunal to draw the opposite conclusion to that of Mr Cole. Where the MoD withholds information of this nature, it is because a careful decision has been taken that it is not operationally safe to release it, and that the MoD has instead sought to enable public scrutiny and debate at a more general, policy, level. That is also the evidence of Group Captain Flewin.

34. The public interest clearly balances in favour of maintaining the exemptions. In truth, the information withheld in Parts A and B would contribute little, if anything, to the more general – legitimate – public debates about the use of UAVs in modern military campaigns.
35. Should it be necessary to do so, the MoD relies on an aggregation of the public interest factors. There is very strong overlap between the section 26 and 27 exemptions in this context; the same factors arise in both. The Tribunal should consider them together.

### **Conclusion**

36. This appeal should be dismissed.

**CHRISTOPHER KNIGHT**

**11KBW**

4 July 2017

