



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

EA/2013/0042 & 0043

ON APPEAL FROM:

**Information Commissioner's Decision Notices: FS50462269 and
FS50462865,
Both dated: 7 February 2013**

**Appellant: CHRIS COLE
Respondent: THE INFORMATION COMMISSIONER
Second Respondent: MINISTRY OF DEFENCE**

**Heard at: Field House
Date of hearing: 23 and 24 September 2013**

Date of Decision: 30 October 2013

Before

**Annabel Pilling (Judge)
Anne Chafer
Suzanne Cosgrave**

Subject matter:

FOIA – Qualified exemptions – Prejudice to the capability, effectiveness or security of relevant forces s.26(1)(b)

FOIA – Qualified exemptions – Prejudice to international relations s.27(1)

Representation:

For the Appellant: Sam Jacobs
For the Respondent: Robin Hopkins
For the Second Respondent: Charles Bourne

Decision

For the reasons given below, the Tribunal refuses the appeals and upholds the Decision Notices dated 7 February 2013.

Reasons for Decision

Introduction

1. This is an appeal against two Decision Notices issued by the Information Commissioner (the 'Commissioner') dated 7 February 2013.
2. The Decision Notices relate to requests made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Ministry of Defence ('the MOD') for information about the use by the British Armed Forces of unmanned aerial vehicles ('UAVs'), often referred to as "drones", in Afghanistan. The MOD refused to disclose some of the information requested on the basis that it was exempt under section 26 FOIA (prejudice to the capability, effectiveness and security of relevant forces). The Commissioner agreed with the MOD and the Appellant appeals against his decision.

Background

3. At present, it is understood that only the UK, the USA and Israel have acquired armed UAVs, the UK having acquired its armed UAV capability in October 2006. The RAF's Reaper UAV operations began in Afghanistan in October 2007 and, having been declared an

International Security Assistance Force (ISAF) asset, it is predominately tasked in support of the ISAF's daily operations priorities list within Afghanistan. It has a variety of uses; collecting data that helps intelligence specialists build up an understanding of the pattern of life for a specific area of interest such as potential enemy forces location, providing real-time over watch of any ground operations that result from such intelligence, providing direct support and information to the troops on the ground, supporting activities such as personnel and equipment convoys, counter Improvised Explosive Device (IED) searches or targeted killing.

4. The UAV is controlled at all times from either the USA (Creech Air Force Base in Nevada) or the UK (RAF Waddington) by a trained pilot and sensor operator using ground and satellite based data links. The Reapers primary mission is to act as an Intelligence, Surveillance and Reconnaissance air asset, employing sensors and full-motion video camera to provide real-time data to military commanders and intelligence specialists. The secondary mission is to provide armed support to forces on the ground and, if required, engage emerging enemy targets in accordance with extant rules and directives. The Reaper can deploy both the GBU-12 (a 500lb laser guided bomb) and the Hellfire air to ground missile (a 100lb laser guided missile), with a total of 386 weapons launched up to May 2013. These weapons can also be deployed by other coalition assets, such as the US-F16 and A10. The Apache carries Hellfire and a similar weapon is carried by the Tornado. All weapon releases are authorised in accordance with the UK Rules of Engagement (ROE) and can only be released by the flying pilot and guided to their target by the sensor operator; the UAV has no automated means of releasing and guiding a weapon.
5. The Appellant is the founder of Drone Wars UK, a small British NGO, undertaking research, education and campaigning in the use of UAVs and the wider issue of remote warfare.

The requests for information

6. Request 1 ('province and date information'), made on 5 January 2012, was made in the following terms:

"In September 2011 the Royal Air Force announced that the 200th weapon had been launched from a British Reaper unmanned aircraft in Afghanistan. Under the Freedom of Information Act I would like to request the date and province within Afghanistan, of each weapon launch. I would also like to know whether damage assessment had been carried out after each weapon launch."

7. The MOD confirmed that it did conduct damage assessment after each weapon launch. The information requested about the date and province of each weapon launch was exempt on the basis of section 26 FOIA (prejudice to the capability, effectiveness or security of relevant forces) and section 27 FOIA (prejudice to international relations.)
8. Request 2 ('daily versus dynamic tasking information') made on 28 May 2012, was made in the following terms:

"I would like to request under the Fol Act information about the release of weapons from British Reaper UAVs in Afghanistan. Can you tell me, for each year since 2008, how many weapons were released from British Reaper UAVs under daily air tasking orders and how many were released under dynamic targeting procedures? Can you also tell me the total number of weapon releases from British Reaper UAVs in Afghanistan to date?"

9. Initially the MOD refused to comply with the request on the basis of section 14 FOIA (repeated requests). After an internal review, the MOD accepted that section 14 had been misapplied. The MOD provided the Appellant with a breakdown, by year, of the number of weapons released from British Reaper UAVs from 2008 to date. It explained that to breakdown these annual figures into "daily or

dynamic” tasking categories would result in the disclosure of information which is exempt under section 26(1)(b) of FOIA.

10. The Appellant complained to the Commissioner who on 7 February 2013 decided that both the province and date information and the daily versus dynamic tasking information were exempt from disclosure under section 26(1)(b) FOIA. During the investigation the Commissioner had been provided with the disputed information. He was also provided with detailed explanations from the MOD in respect of why it said that the information would cause the prejudice claimed. Those explanations comprised sensitive information which would itself be exempt from disclosure under section 26(1)(b) FOIA.

The appeal to this Tribunal

11. Understandably, the Appellant queried how the competing cases could properly be tested and explained in these circumstances and appeals against the Commissioner’s Decision Notices. He requested an oral hearing of the appeals, which were heard together.

12. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and written submissions from the parties. We were also provided with a small closed bundle which was not seen by the Appellant. On the first day of the hearing we were also provided with a bundle of authorities. Although we cannot refer to every document in this Decision, we have had regard to all the material before us.

13. The Appellant did not contest that a closed material procedure is appropriate in the circumstances of this Appeal. There is recent guidance for the approach to be taken by courts and tribunals in such circumstances.

14. In *Bank Mellat v HMT (no.1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said inter alia at paragraphs 68-74 that:

- i) If closed material is necessary, the parties should try to minimise

the extent of any closed hearing.

- ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.
- iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.
- iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

15. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

- i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.
- ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

- iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.
- iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.
- v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

16. We were provided with closed material in this case. This consisted of a short skeleton argument from the MOD, a witness statement from the MOD expert, a Squadron-Leader, an email chain concerning the use of section 27 FOIA, and the disputed information itself.

17. The closed material was the subject of an application under Rule 14 of The Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009. The Appellant had been notified that such an application was being made. After the Tribunal gave a direction prohibiting disclosure of the closed material, the Appellant was provided with a redacted copy of the skeleton argument and a statement setting out the gist of the portions of the statement of the Squadron-Leader that were to remain closed.

18. At the start of the hearing, the Tribunal requested the MOD to prepare a copy of the Squadron-Leader's closed statement with the closed portions redacted so that the Appellant was aware of the limited amount of closed material being considered. During the hearing the Appellant was also provided with a more detailed gist of the closed portions of the statement and a detailed gist of the email to the USA in respect of the section 27 exemption.

19. We kept the issue of the closed material under review throughout the proceedings. We heard some evidence and submissions in closed

hearing and then summarised the contents of those hearings to the Appellant.

Evidence

20. We were provided with two statements from the Squadron-Leader and he gave evidence before us, in both open and closed sessions. He adopted the contents of his witness statements and was then cross-examined by the Appellant. In the closed session he provided us with more information in respect of those areas which had been raised in cross-examination and which he was not able to answer in the open session.

21. He is currently working as a Requirements Manager for the Reaper, Remotely Piloted Aircraft System (RPAS). Within this post he is tasked with the generation and management of the capability requirements for Reaper and the future delivery of an armed Intelligence, Surveillance and Reconnaissance (ISR) air asset.

22. He has served as a combat ready pilot on the Tornado GR1/4 on operational deployments in the Middle East, including Iraq. Since 2007 he has been trained as a combat ready pilot on the MQ-9 Reaper serving with 39 Squadron, based at Creech Air Force Base, Nevada, USA. From October 2007 to September 2009 he flew daily combat missions in support of the International Security Assistance Force (ISAF) operation in Afghanistan. During this period he qualified as a Reaper instructor and trained the next generation of UK RPAS pilots and became the Deputy Squadron Commander responsible for the supervision of all aspects of the combat operations on 39 Squadron. From October 2009 to February 2010 he was the UK's Air Operation Coordinator at the Al Udeid Combined Air Operations Centre, responsible for the day to day tasking and reporting of all UK Fixed Wing Assets in the Middle East, including Reaper. From March 2010 until December 2012 he was the RPAS subject matter expert within the Head Quarters of the RAF's No 1 Group supporting and reporting on

the Reaper capability from the perspective of the RAF.

23. There was no challenge to the Squadron-Leader's status as an expert witness in respect of the use of Reaper. The Appellant urged us not to defer to the views of the MOD and reminded us that it was for the Tribunal to decide whether the MOD's assertion of prejudice was borne out by the evidence.

24. We also heard evidence from the Appellant who adopted his witness statement and expanded upon it. He was not cross-examined. We read the witness statement of Tom Watson, MP, who was not called to give evidence.

The Issues for the Tribunal

25. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

26. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

Section 26 – prejudice the capability, effectiveness or security of any relevant forces

27. Section 26 of FOIA is a qualified exemption and the relevant parts provide as follows:

(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 any of those forces.

28. This is a prejudice-based, qualified exemption. There are essentially two issues for the Tribunal to decide:

- i) would disclosure of the information be likely to prejudice the capability, effectiveness or security of any relevant forces;
- ii) if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing it?

29. All parties agree that the approach to the prejudice-based exemptions is well established. Both matters are for the Tribunal to determine for itself in light of the evidence. Our attention was drawn to Secretary of State for the Home Department v Rehman [2001] UKHL 47, R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65 and All Party Parliamentary Group on Extraordinary Rendition (APPGER) v Information Commissioner and The Ministry of Defence [2011] UKUT 153 (AAC). Appropriate weight needs to be attached to evidence from the executive branch of the government about the prejudice likely to be caused by disclosure of particular information. The Appellant asks us not to defer to the view of the MOD but assess whether the assertion of prejudice is borne out by the evidence.

30. The prejudice relied on must come within the terms of the exemption.

It must be real, actual or of substance. In order for the 'would be likely to' threshold to be met, there must be a significant and weighty chance of that prejudice arising, even if falling short of being more probable than not. The 'would' threshold requires a slightly higher probability of that prejudice arising. There must be a causal link between the disclosure of the disputed information and the envisaged prejudice.

31. The risk of prejudice protected by this exemption in this case involves the life and death of service personnel, not just UK forces but those operating as part of the coalition ISAF forces in Afghanistan.
32. In respect of the province and date information, the MOD submits that disclosure would be likely to prejudice the capability, effectiveness and security of the relevant forces, and in respect of the daily versus dynamic tasking information that disclosure would cause that prejudice.
33. The Squadron-Leader explained that disclosing this information would be revealing more information about the use of UAVs in Afghanistan than is currently in the public domain which would increase the amount of information available to enemy forces in Afghanistan.
34. There is information already in the public domain concerning the use of UAVs as a method of deploying weapons in Afghanistan.
35. The United States Air Forces Central Command Combined Air and Space Operations Center has disclosed 2007-2012 Airpower Statistics. The total number of weapons releases from UAVs form approximately 5-10% of the total weapon releases. In 2009 a total of 4163 weapons were released, 255 from UAVs. In 2010 a total of 5102 weapons were released, 278 from UAVs. In 2011 a total of 5409 weapons were released, 294 from UAVs. Up to October 2012 a total of 3600 weapons were released, 333 from UAVs. The MOD has disclosed the total number of weapons releases by the UK's Reaper UAVs during the period 1 May 2008 to 31 January 2013. From 1 May to 31 December 2008 a total of 30 weapons were released by Reaper, 44 in 2009, 73 in 2010, 111 in 2011 and 104 in 2012.

36. The Appellant submits that from these statistics, it can be seen that the UK is responsible for approximately one quarter of “drone strikes” in Afghanistan and that these form a small part of the total weapons released by the ISAF.
37. The Appellant submits that there can be no prejudice by disclosing the province and date information in light of the information already disclosed and available to enemy forces. In particular, he drew attention to a compilation which he had prepared from RAF weekly releases which appear to give operational details at a level with which the Squadron-Leader stated in his open oral evidence he was not comfortable. The Appellant submits that the province and date data would, in reality, add nothing of significance to the information already available to enemy forces in respect of which provinces the UK’s Reaper was used to deploy weapons. Upon closer analysis however, we agree with the Squadron-Leader that these RAF releases have been drafted carefully to reveal very little by way of detail that could identify where a particular weapon launch took place.
38. In cross-examination, it was suggested to the Squadron-Leader that a weapon released by a UAV would be obvious to any bystander and that therefore the enemy forces in Afghanistan will be aware already which incidents have involved the use of UAVs. The Squadron-Leader disagreed that it would be possible to identify the method of deployment as various aircraft deploy the same weapons and the airspace is often congested at any given time.
39. We do not possess experience or knowledge in this field and prefer the evidence of the well-qualified Squadron-Leader over the mere assertion made by the Appellant that the release of a weapon by a UAV is so obvious that the enemy forces will already have the province and date information requested.
40. We consider that the release of this information would add something more to the information already in the public domain. As an

experienced combat pilot for Tornadoes as well as Reaper, with experience in combat in Iraq as well as Afghanistan, having worked alongside the USA, we give substantial weight to the evidence of the Squadron-Leader. He gave real first hand evidence rather than telling the Tribunal how policy decisions were informed.

41. In the closed portion of his witness statement, at paragraphs 20 and 21, the Squadron-Leader identified the specific harm that disclosure of the province and date information is likely to cause. We have made comments on this in our closed judgment.

42. It is difficult for anyone to assess or estimate what use enemy forces could make of the information withheld by the MOD. The enemy forces in Afghanistan are unknown, uncertain and operate covertly. Because of his role in intelligence gathering, the Squadron-Leader was able to provide us with specific evidence about how the enemy has and could adapt their tactics from information they receive of the activity of coalition forces. We gave substantial weight to his evidence. There was no evidence or cogent reason advanced for us to depart from his view of the use to which enemy forces in Afghanistan could put this information. We are therefore satisfied that the disclosure of the information withheld by the MOD would cause prejudice to the effectiveness, capability and security of relevant forces in Afghanistan.

43. During the proceedings before the Tribunal and during the hearing itself, we explored the possibility of the MOD releasing the province and date information in monthly or annual statistics. We were satisfied in the closed portion of the Squadron-Leader's evidence that releasing the information in this amended way would still cause the real risk of harm in the same way as if the information were released by specific date.

44. We are satisfied that the exemption in section 26(1)(b) is engaged in respect of the province and date information.

45. We are also satisfied that the exemption is engaged in respect of the

daily versus dynamic tasking information.

46. It is not in dispute that the Reaper UAV can receive orders under 'daily tasking orders' before airborne, or under 'dynamic tasking' which is a change 'daily' tasking, whether airborne or not. Examples of 'dynamic tasking' include:

- a) There is a true belief that there is an imminent threat to life, e.g. friendly forces are in contact with enemy forces.
- b) Real evidence of hostile intent to coalition forces, e.g. enemy forces with weapons moving to firing points in close proximity to friendly forces.
- c) Witnessing a hostile act such as the active laying of an IED.

47. There are examples within the Appellant's compilation from RAF releases to illustrate each of these. Although the Squadron-Leader accepted that this compilation of RAF releases suggests that the majority of weapons deployed by UAVs are deployed under dynamic tasking as opposed to daily tasking orders, he said in evidence that the reports are carefully drafted and do not give the complete picture.

48. In the closed portion of his statement at paragraphs 13-18, he gave further evidence in respect of this. In light of the significant weight we give to his evidence for the reasons set out above, we accept his evidence in respect of the prejudice that disclosure of the daily versus dynamic information would cause to the capability, effectiveness and security of relevant forces.

49. The information requested concerns a campaign that is still ongoing. While the data itself might be historical, it does have relevance to the continuing campaign. Because the Appellant has not seen the closed portions of the Squadron-Leader's statement he is limited in his ability to challenge what is relied upon by the MOD. We have not simply accepted what has been stated but have examined the evidence

presented to us. The MOD referred to the disclosure of the requested information as involving “risk to life and limb”, the Commissioner used the phrase “life and death.” We do not consider either of these phrases to be over dramatising the level of risk that could be caused to service men and women should the information be released and available to enemy forces in Afghanistan. In light of the Squadron-Leader’s evidence about the ability of enemy forces’ learning capabilities, we are satisfied that the disclosure of the information withheld by the MOD would cause prejudice to the effectiveness, capability and security of relevant forces in Afghanistan.

50. Having found the exemption engaged in respect of both requests, we must go on to consider whether in all the circumstances of the case the public interest in maintaining the exemption at section 26(1)(b) outweighs the public interest in disclosing the information.

Public interest test

51. As the exemption is engaged, we must carry out our own assessment as to where the balance of public interest lies in relation to the disputed information.

52. The following principles are material to the correct approach to the weighing of competing public interest factors and the matters that we should properly take into account when considering the public interest test, reminding ourselves that each case must be decided on its own facts.

- (i) The “default setting” in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld.
- (ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

- (iii) Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.
- (iv) The assessment of the public interest in maintaining the exemption should focus on the public interest factors associated with that particular exemption and the particular interest which the exemption is designed to protect.
- (v) The public interest factors in favour of maintaining an exemption are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance.
- (vi) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these considerations are central to the operation of FOIA and are likely to be relevant in every case where the public interest test is applied. However, to bear any material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances.
- (vii) The “public interest” signifies something that is in the interests of the public as distinct from matters which are of interest to the public.

53. The public interest in maintaining the exemption in section 26(1)(b) is exceptionally weighty. There is an exceptionally strong public interest in preventing harm to the UK’s capabilities in an ongoing armed conflict. The security and safety implications carry very strong public interest weight.

54. We agree with the Commissioner that there would need to be very weighty countervailing considerations to outweigh a risk to security and safety of the forces which was of sufficient severity to have engaged section 26(1)(b).

55. The Appellant and Tom Watson, MP, in their witness statements set out their arguments for the public interest being in favour of disclosure of the requested information.

56. The concerns raised by the Appellant relate to the use of UAVs generally rather than alleging any “scandal” concerning the use of armed UAVs in Afghanistan. His concerns can be summarised as follows:

- i) the use of armed UAVs has made the option to resort to the use of lethal military force much easier. The political cost of engaging in conflict is reduced if the public cost of loss of life by service personnel is removed.
- ii) Other countries are considering acquiring armed UAVs.
- iii) Although the UK insists it has used armed UAVs only in Afghanistan, the USA has deployed armed UAVs in at least six countries since 2007.
- iv) Whether the use of armed UAVs is leading to more strikes.
- v) The controversial use of armed UAVs by the USA for targeted killing of suspected terrorists and insurgents outside of Afghanistan and the suggestion that UK intelligence agencies have supplied information to the USA to help identify and locate targets in Pakistan.
- vi) The possibility that the UK may have used its Reaper UAVs to carry out targeted killing in Afghanistan and whether insurgents are “combatants” as defined in international law to permit the use of force authorised by the UN.

- vii) Whether the geographic and psychological distance between those operating armed UAVs and potential targets leads to a lowering of the significance of lethal operations (the 'Playstation mentality').
- viii) Questions over the precision strike capabilities.
- ix) Questions over civilian casualties.
- x) Whether the use of armed UAVs is creating instability rather than delivering the stated aim of long-term peace and security in Afghanistan.

57. We agree with the Appellant that there are legal and ethical implications in the use of armed UAVs and we agree that these implications should be considered as part of an informed public debate. There is significant public interest in transparency about the UK's use of armed UAVs.

58. We have focussed on the extent to which this particular information would further public debate and scrutiny on this issue. We do not agree with the Commissioner however that this particular information withheld by the MOD would, or even could, go a significant way to informing this debate. In his Decision Notices, the Commissioner considered that *"it would provide a clear insight into how UAVs had been used by British forces since 2008, i.e. it would reveal something about the circumstances under which the weapons had been deployed or it would reveal the provinces in which they were used and the specific dates of any weapon launch."*

59. In our opinion, the information with which we are concerned in this case, the province and date information and the daily versus dynamic information, does not inform in respect of any of the legal or moral considerations of the public debate. The statistical data already in the public domain reveals the annual number of weapons deployed by UAVs which can be compared with those deployed by other air assets,

fixed wing and helicopters.

60. The disputed information itself will not inform the debate in respect of the capabilities of armed UAVs, other countries possibly acquiring armed UAVs, whether the use of armed UAVs is leading to more strikes, whether there has been or may have been civilian casualties, whether UK intelligence agencies have supplied information to the USA to help identify and locate targets in Pakistan, whether the use of armed UAVs is creating instability rather than delivering the stated aim of long-term peace and security in Afghanistan
61. The Appellant's compilation of the RAF releases does, at first blush, reveal location data in respect of a weapon released by the Reaper UAV. However, we agree with the Squadron-Leader that the releases have been nuanced in such a way that no isolated incident can be identified, either by date or location.
62. The Appellant submits that as the UK forces are based in Helmand province, any information that reveals the use of the Reaper UAV in other provinces may reveal that it is not being deployed to protect UK troops, "as politicians have said in order to justify the use of UAVs". He appeared to be suggesting that the province and date information would allow public scrutiny of whether the Reaper UAV had been used lawfully, as if it was being used for a purpose other than protecting UK troops that would be unlawful.
63. With respect to the Appellant, he may not have understood that the UK Reaper UAVs are a declared ISAF asset, that is, they are part of the coalition assets and will be deployed as part of the coalition campaign not reserved for UK use and protection. The RAF releases make it clear that the Reaper UAV has regularly been deployed to offer support to USA Marines and Afghan national security. In closing submissions, it was conceded that if the province and date information revealed that the Reaper UAV had deployed weapons in a province other than Helmand it could have been lawfully supporting a different ISAF troop.

There is no public interest factor at play in this regard; the province and date information will not reveal that Reaper UAVs have been used in a different manner from that already known. The information does not reveal that Reaper UAVs have been deployed in other countries. It might reveal to enemy forces where assets were used – and where they were not.

64. The Squadron-Leader was asked about the 'Playstation mentality'. He accepted that one USA Predator crew had been investigated in respect of an incident in 2010 which led to the deaths of 23 Afghan civilians. The inquiry concluded that a significant contributing factor had been that crew's propensity or bias towards kinetic action. He gave compelling evidence to the contrary. In his experience, the ground based pilot of the Reaper UAV is in a better position in his knowledge of the ground with more tools and access to more information, without the threat to his or her own life, than the pilot of a Tornado flying at twenty to thirty thousand feet looking at a very small screen. In addition, the crews operating the Reaper have built up extensive knowledge from the hours of surveillance and are more emotionally engaged rather than less in his opinion.

65. Although further exploration in respect of the existence or otherwise of what has been dubbed the 'Playstation mentality' might be necessary, we do not consider that either the province and date information or the daily versus dynamic information being withheld in this case will inform that exploration.

66. In respect of the daily versus dynamic tasking information, as it is accepted that the Reaper UAV can be utilised in both ways, we do not consider that disclosing actual figures for how it has been used during this conflict would provide any useful information to add to the public debate. The decision to authorise the use of a weapon is the same whether under daily or dynamic tasking orders and revealing the figures will not provide any meaningful information. The deployment of the weapon itself, left to the final moment for the operator to decide, is

no different whether deployed under daily tasking orders or whether dynamic. At all times the personnel involved with the decision, ultimately the operator, are given the opportunity to stop or divert a weapon release if they do not believe it is in line with UK rules and directives, for example, diverting the weapon if civilians suddenly emerge. No matter what the approval process, it is always the aircraft crew, whether air or ground based, who ensure that the authorised weapon release is conducted safely and within the rules. There might be public interest in favour of disclosure if the information revealed any illegitimacy of use or failure to engage in the rules of warfare but the information sought does not provide any such suggestion.

67. The Appellant has shown awareness that some of the information he might wish to be disclosed might put UK troops at risk. He told us that he has attempted to narrow his requests for information to obtain as much information about how armed UAVs are operated on a day-to-day basis without putting troops in jeopardy.

68. The MOD submits that a qualified exemption should not be allowed to become a de facto absolute exemption, although where the capability, effectiveness and security of the forces is likely to be a matter of life and death, it would require a very substantial public interest reason to outweigh the public interest in maintaining the exemption. We agree with this analysis. There may be cases where the prejudice to the effectiveness, capability or security might be a real nuisance and might cause extra work or wasted manpower, but here we are concerned with information which we have already found would cause real risk to life of troops in Afghanistan, both now and in the future.

69. We consider the public interest in maintaining the exemption and protecting life, of both relevant forces and civilians in Afghanistan, is a factor of such weight that there would need to be significant factors in favour of disclosure to outweigh it. In this particular case we do not consider that there are any real public interest factors that would favour disclosure of this particular information in this case, and none that

come anywhere near outweighing the risk to life.

70. This is an active campaign with a real, identified enemy whose capabilities are unknown but are adapting. There is a protocol in place for when information may be released once the UK has withdrawn from Afghanistan. We do not feel that we can overturn that protocol without cogent evidence that this is what the public interest demands.

71. The information withheld by the MOD is not a detailed analysis of each and every strike by a Reaper UAV and its crew. The public debate on the use of UAVs is being promoted by the information already made available and which has been sanitised in a way to protect the lives of service personnel in Afghanistan. We do not consider that the MOD is frustrating any public debate.

72. We are therefore satisfied that in respect of the province and date information and the daily versus dynamic tasking information that the public interest in maintaining the exemption far outweighs any public interest in disclosure. The MOD is entitled to withhold the information.

Section 27 - Prejudice to international relations

73. In respect of the exemption provided for in section 27 FOIA, this was relied upon by the MOD in respect of the province and date information. In light of his conclusion that section 26(1)(b) was engaged, the Commissioner did not proceed to consider whether section 27 was also engaged. The Appellant invites us to consider whether section 27 is engaged regardless of our decision in respect of section 26. He submits that as we have heard evidence and arguments we should reach a decision that would inform future applications. The MOD does not invite us to consider section 27 if we conclude that section 26(1)(b) is engaged.

74. We do not need to reach a decision on section 27. We do not consider that it is part of the role of the First-Tier Tribunal to enter into an academic exercise of this nature. We are not a tribunal of record and

our decisions are not binding in any way.

75. We therefore unanimously refuse this appeal.

Annabel Pilling

Judge

30 October 2013