Appeal No: EA/2021/0035

IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)
B E T W E E N :

CHRIS COLE

Appellant

-and-

(1) THE INFORMATION COMMISSIONER
(2) MINISTRY OF DEFENCE

Respondents

RESPONSE OF THE MINISTRY OF DEFENCE

I. INTRODUCTION

1. On 2 January 2020, the Appellant made certain information requests concerning "*RAF Reaper aircraft*". In particular, the Appellant requested: "*Please can you detail how many sorties have RAF Reaper aircraft flown outside of Operation Shader during 2019 and, if any, where these sorties occurred?*" ("**the Information Request**").

2. By Decision Notice IC-39378-S8W1 of 4 January 2021 ("**the Decision**"), the Information Commissioner ("**the Commissioner**") held that the Ministry of Defence ("**MOD**") could withhold the information requested under section 26(1)(b) of the Freedom of Information Act ("**FOIA**"). The Decision provides at §2: "*The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 26(1)(b) of FOIA and that in all the circumstances of the case the public interest favours maintaining the exemption.*" This appeal arises in respect of the Decision. The MOD submits that the appeal should be dismissed.

3. The Appellant has filed "*Outline Grounds of Appeal*"[1] dated 29 January 2021 ("**GA**"). The Appellant has not identified distinct grounds of appeal in the GA. Nevertheless, the MOD understand the following grounds to be advanced:

    a. Ground 1: the Appellant alleges that inadequate reasons to support the Decision were disclosed (see §§9-10 and 12 GA).

    b. Ground 2: the Appellant alleges that the Commissioner erred in applying the public interest test under section 26 FOIA (see §§13-18 GA).

    c. Ground 3: the Appellant alleges that the Commissioner should have determined whether section 27 FOIA applied and, had she done so, ought to have held that it did not on the basis that "*[t]here is no evidence that the MoD has approached the foreign states concerned and asked, in a neutral manner, whether they object to disclosure of the limited information sought*."

4. The appeal should be dismissed for the reasons stated in the Decision and set out in this Response. In broad summary:

    a. As to Ground 1, the Decision articulates sufficient reasons in support of the Commissioner's conclusion that the withheld information is exempt from disclosure on the basis of section 26(1)(b) FOIA. In any event, the First-tier Tribunal ("**the Tribunal**") is able to determine the application of sections 26(1)(b), 27(1)(a) and 27(1)(c) FOIA itself, such that any inadequacy in the reasons supporting the Decision should not result in the Commissioner's conclusion that the withheld information is exempt from disclosure being disturbed.

    b. As to Ground 2, the Commissioner's findings as to the balance of the public interest under section 26(1)(b) FOIA were lawfully made in all the circumstances. Contrary to the Appellant's submissions, the public interest test falls firmly in favour of the requested information being withheld.

[1] The significance of the description of the GA as "*Outline*" is not understood. The Appellant ought to have pleaded his grounds of appeal fully in the GA. In the event that the Appellant seeks to amend the GA materially or add additional grounds of appeal, the MOD reserves all rights.

c. As to Ground 3, the MOD recognises that the Commissioner's findings regarding section 26(1)(b) FOIA were dispositive of the complaint such that it was not necessary for the Commissioner to consider the application of sections 27(1)(a) and 27(1)(c) FOIA in addition. In any event, the Appellant's contention that the MOD was required to approach foreign states to discharge its burden of proving prejudice to relations between the United Kingdom ("**UK**") and other states and to the interests of the UK abroad is plainly wrong. The MOD is not obliged to approach foreign states when withholding information under sections 27(1)(a) and 27(1)(c) FOIA.

5. Two additional points arise from the GA:

a. It appears from §11 GA that the Appellant intends to make an application to the Tribunal "*to release more of the information relied-upon so that he may properly respond to it.*" No such application has been filed by the Appellant in the period of over three months since the GA were filed. The MOD reserves all rights in the event that such an application is made in due course.

b. At §14 GA, the Appellant seeks to re-draft the Information Request to remove its reference to locational details. The Appellant thereby proposes that the Tribunal rule on a request that is materially different to the Information Request in fact made. The Tribunal lacks jurisdiction to do so.

6. It is noted that, by the Commissioner's Response dated 2 March 2021, the Commissioner contends that the Appeal should be dismissed. Insofar as the Commissioner's Response accords with this Response, it is adopted herein.

II. FACTUAL BACKGROUND OF THE INFORMATION REQUESTS

7. On 2 January 2020, the Appellant submitted the following requests for information to the MOD, of which the Information Request is at (6).

1) For each month between October 2019 and December 2019, and broken down between i) Reaper and ii) Typhoon
a) the total number of missions undertaken by these aircraft on Operation Shader; b) the number of those missions entering Syria; c) the number of those missions entering Iraq?
2) For each month between October 2019 and December 2019, the number of sorties with weapons released by a) Reaper and b) Typhoon and broken down between Iraq and Syria?
3) For each month between October 2019 and December 2019, the number and type of weapons released by a) Reapers, and b) Typhoon, broken down between Iraq and Syria?
4) The number of UK weapon release events in a) Iraq and b) Syria per month from October 2019 to December 2019, broken down between Reaper and Typhoon?
5) Please can you tell me, for each month between October 2019 and December 2019, how many hours have UK a) Reaper and b) Typhoon flown on Operation Shader?
6) Please can you detail how many sorties have RAF Reaper aircraft flown outside of Operation Shader during 2019 and, if any, where these sorties occurred?

8. By way of context:

   a. Operation Shader is the UK operational name for the UK's contribution to the US-led military campaign against Daesh. The UK have been participating in operations within Iraq and Syria under Operation Shader since 2014.

   b. Reapers and Typhoons are airframes used by the Royal Air Force. The Reaper platform is a Remotely Piloted Air System ("**RPAS**"). Typhoon (formerly known as Eurofighter) is a traditional multi-role combat aircraft.

   c. A 'sortie' is a mission conducted by an airframe. In the context of the Information Request, a sortie was understood to be a single flight by a Reaper airframe for any purpose.

9. For the purposes of this Appeal, the MOD regards the number zero or any greater number as information responsive to the Information Request. Nothing should be inferred from this Response as to whether the number responding to the Information Request is zero or any greater number.

10. On 17 February 2020, the MOD responded to the information requests in the Appellant's email dated 2 January 2020 ("**the Response**"). The MOD provided the Appellant with information responding to (1)-(5) in his email of 2 January 2020. The MOD withheld information responding to the Information Request, relying on sections 26(1)(b), 27(1)(a) and 27(1)(c) FOIA. As the exemptions relied upon were qualified exemptions, a public interest assessment was undertaken. The MOD concluded that the public interest in disclosure of the requested information was strongly outweighed by the arguments against disclosure. The MOD's Response to the Appellant of 17 February 2020 mistakenly stated that the level of prejudice was "would be likely", when it ought to have stated "would".

11. On 18 February 2020, the Appellant requested an internal review of the Response.

12. On 15 April 2020, the MOD reported the outcome of its internal review. The MOD upheld its application of the various exemptions identified in the Response in respect of the Information Request. At §17 of the internal review, the MOD corrected the error in the Response, stating: "*As part of this review, I can confirm that the level of prejudice for the exemptions is engaged at the higher level of 'would' prejudice rather than 'would be likely to'.*"

13. On 16 April 2020, responding to an email of the Appellant dated 15 April 2020 requesting clarification of the level of prejudice, the MOD confirmed the position as follows: "*Apologies if this was not clear in the internal review but the level of prejudice for both exemptions should have been set at the higher level of 'would', at the outset.*"[2]

14. On 27 April 2020, the Appellant complained to the Commissioner. He contended that there was a compelling public interest in the disclosure of the requested information.

15. On 4 January 2021, the Commissioner issued the Decision. So far as is material, the Commissioner reached the following conclusions:

[2] As is clear from this summary, the Appellant was notified in clear terms of the level of prejudice in advance of his complaint to the Commissioner. The suggestion at §12 GA that the Appellant was impeded in advancing arguments to the Commissioner or in this Appeal by reason of confusion arising from the mistaken reference to "would be likely" in the Response should be afforded minimal, if any, weight.

a. As to the first stage of analysis under section 26(1)(b) FOIA, namely whether the relevant harm would or would be likely to occur if the withheld information were disclosed, the Commissioner held at §14: "*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*."

b. As to the second stage of analysis under section 26(1)(b) FOIA, namely whether there is a causal relationship between the potential disclosure and the prejudice, against which the exemption is designed to protect, the Commissioner held at §15:

> "*… The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which section 26(1)(b) is designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the MOD believes would be likely to occur is one that can be correctly categorised as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in prejudice to the capability, effectiveness or security of British armed forces.*"

c. As to the third stage of analysis under section 26(1)(b) FOIA, namely whether disclosure would or would be likely to result in prejudice, the Commissioner held at §16:

> "*In relation to the third criterion, the Commissioner is satisfied that the likelihood of prejudice occurring if the withheld information was disclosed is clearly one that is more than hypothetical. Rather, taking into account the arguments set out in the MOD's submissions to the Commissioner, she is satisfied there is a real and significant risk of this prejudice occurring as the information would assist adversaries in making a detailed assessment of the effectiveness of UK tactics and operational capabilities, which in turn would risk the security of UK personnel. She also agrees with the MOD that the higher threshold of 'would' prejudice is met.*"

d. Turning to the public interest test, the Commissioner considered the Appellant's submissions at §§19-22 of the Decision and the MOD's submissions at §23. At §24,

the Commissioner considered there to be: "*a significant and weighty public interest in disclosure of the withheld information*". However, at §25, the Commissioner concluded:

> "*… the Commissioner is also conscious that disclosure of the information risks undermining the capability and effectiveness, and ultimately the safety of, British armed forces. Such an outcome is clearly against the public interest. Furthermore, in the circumstances of this case the Commissioner is conscious that disclosure of the information would, rather than simply being likely to, result in prejudice which in her view adds further weight to the public interest in maintaining the exemption. Consequently, despite the significant weight that the Commissioner accepts should be given to the public interest arguments in favour of disclosing the withheld information, she has reached the conclusion that the public interest favours maintaining the exemption.*"

e. Having found that section 26(1)(b) was properly applied, the Commissioner did not consider section 27(1)(a) or 27(1)(c)[3] FOIA: see §26.

III. RESPONSE TO THE GROUNDS OF APPEAL

a) Ground 1: the adequacy of the Commissioner's reasons

16. The Appellant contends at GA §9 that: "*The IC's refusal relied … on reasons which are not disclosed.*" The Decision addresses the application of section 26(1)(b) FOIA lawfully. The Appellant does not contest that a closed material procedure was appropriate before the Commissioner or in this Appeal. Rather, properly construed, the Appellant's contention merely reflects his disagreement with the Decision. No legal error is thereby identified.

17. In any event, Ground 1 is academic. Any inadequacy in the reasons supporting the Decision (*quod non*) should not lead to the Commissioner's conclusion that the withheld information is exempt from disclosure being reversed.

[3] The Decision erroneously refers to section 27(1)(b), rather than 27(1)(c) FOIA.

a. The role of the Tribunal was described in *Birkett v Department for the Environment, Food and Rural Affairs* [2011] EWCA Civ 1606 as follows:

> *"58 … The tribunal is required to consider whether the Commissioner's decision notice was in accordance with law. That directs attention to the contents of the notice and the scope of the Commissioner's duty under section 50. And that directs attention to whether the public authority is required to disclose the information. There is nothing in the language of the section or inherent in the nature of the tribunal's task to limit the scope of that consideration. In other words, the section imposes the "in accordance with the law" test on the tribunal to decide independently and afresh. It is inherent in that task that the tribunal must consider any relevant issue put it by any of the parties. That includes a new exemption relied on by the public authority."*

b. It follows that the Tribunal, considering the application of sections 26(1)(b), 27(1)(a) and 27(1)(c) FOIA afresh, is able to cure any inadequacy in the reasons in the Decision in the course of determination of the appeal. In this Response, the MOD has endeavoured to provide the Appellant and the Tribunal with information concerning the application of the exemptions, otherwise than by way of CLOSED material.

b) Ground 2: the public interest test

(i) The legal principles concerning section 26(1)(b) FOIA

18. Section 26 FOIA provides, so far as is material:

> *"(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."*

19. Section 26 is a qualified exemption. The stages of analysis required under section 26(1)(b) were properly identified in the Decision as:

    a. whether the relevant harm would or would be likely to occur if the withheld information were disclosed;

    b. whether there is a causal relationship between the potential disclosure and the prejudice, against which the exemption is designed to protect;

    c. whether disclosure would or would be likely to result in prejudice; and

    d. whether the public interest in maintaining the exemption outweighs the public interest in disclosing it.

20. In *All Party Parliamentary Group on Extraordinary Rendition (APPGER) v Information Commissioner and The Ministry of Defence* [2011] UKUT 153 (AAC) ("***APPGER***") at §56, the Upper Tribunal held:

> *"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.'"*

21. The Upper Tribunal reiterated that approach in *Savic v Information Commissioner, Attorney General's Office and Cabinet Office* [2016] UKUT 535 (AAC) at §116:

> "*It must be remembered that what is relevant is an assessment of those reactions rather than of the validity of the reasons for them looked at through "English or any other eyes". In this area there is authority to the effect that the courts and tribunals should attach weight to the views of the government expressed through Secretaries of State, Ministers or senior civil servants because of their relevant experience and expertise in assessing such reactions (see for example APPGER v IC and FO [2011] UKUT 153 (AAC) and the cases cited at paragraph 56 of that decision). We accept that approach and comment that the nature of the written and oral reasoning on it in this case reflected its foundations."*

22. The Upper Tribunal's approach in *APPGER* and *Savic* (quoted above) was articulated in the context of section 27(1) FOIA. In *Chris Cole v ICO and MOD* (EA/2013/0042 & 0043) at §29, the Tribunal properly applied the approach in *APPGER* and *Savic* (set out above) in the context of section 26(1) FOIA.

23. In *Hogan and Oxford City Council v Information Commissioner* [2011] 1 Info LR 588, the Tribunal gave the following guidance on the prejudice test:

> *"27. Under FOIA, disclosure of certain categories of information is exempt if such disclosure 'would, or would be likely to, prejudice' specified activities or interests. …*
> *28. The application of the 'prejudice' test should be considered as involving a number of steps.*
> *29. First, there is a need to identify the applicable interest(s) within the relevant exemption. ...*
> *30. Second, the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thornton has stated "real, actual or of substance" (Hansard HL, Vol.162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a de minimis threshold which must be met. …*
> *31. When considering the existence of 'prejudice', the public authority needs to consider the issue from the perspective that the disclosure is being effectively made to the general public as a whole, rather than simply the individual applicant, since any disclosure may not be made subject to any conditions governing subsequent use. …*
> *34. A third step for the decision-maker concerns the likelihood of occurrence of prejudice. A differently constituted division of this Tribunal in John Connor Press Associates Limited v*

Information Commissioner (EA/2005/005) interpreted the phrase "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk. That Tribunal drew support from the decision of Mr. Justice Munby in R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin) [[2011] 1 Info LR 239], where a comparable approach was taken to the construction of similar words in the Data Protection Act 1998. Mr Justice Munby stated that 'likely':

> *"connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."*

35.On the basis of these decisions there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. We consider that the difference between these two limbs may be relevant in considering the balance between competing public interests... In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question."

24. In the context of section 26(1), relevant prejudice can be established by the risk of a detrimental effect, rather than also demonstrating quantifiable damage: in *APPGER v Information Commissioner and Foreign Office* [2012] 1 Info LR 258 at §130, relying on *Gilby v Information Commissioner & the Foreign and Commonwealth Office* (EA/2007/0071) at §23, the Tribunal held: "*s.27(1)(a) will be engaged if there is a real and significant risk (even if it is less than a probability) that disclosure would prejudice relations with another State in the sense of impairing relations or their promotion or protection.*" The same approach ought to be applied in respect of section 26(1)(b) FOIA.

25. In *Burt v IC and MOD* (EA/2011/0004), the Tribunal considered an appeal concerning an information request about briefings and the summary reports following site visits by the UK Atomic Weapons Establishment ("**AWE**") staff to a United States atomic energy facility called the Y-12 facility in connection with the proposed development of an enriched uranium facility at AWE Aldermaston. The MOD withheld the information

relying on, amongst other exemptions, section 27 FOIA. Dismissing the appeal and applying an approach that ought also to be applied in respect of section 26(1)(b) FOIA, the Tribunal accepted submissions made by the Commissioner to the effect that:

> *"32. … section 27 would necessarily be engaged if there was a real and substantial risk that the disclosure of the two reports without the approval of the US would either:*
> *(1) make relations with the US more difficult, and/or*
> *(2) call for a particular diplomatic response which would otherwise have been unnecessary; and/or*
> *(3) elicit an adverse reaction from the United States itself."*

26. As to the public interest test, in Chris Cole v ICO and MOD (EA/2013/0042 & 0043), the Tribunal held at §§53-54:

> *"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)."*

27. Notably, the Tribunal in Chris Cole v ICO and MOD (EA/2013/0042 & 0043) concluded at §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."*

(ii) Response to the challenge

28. By Ground 2, the Appellant challenges the Commissioner's finding that the public interest in maintaining the exemption outweighs the public interest in disclosing it. Ground 2

should be dismissed. As noted at paragraph 9 above, nothing should be inferred from this Response as to whether the number responding to the Information Request is zero or any greater number, nor any locational information.

29. At §14 GA, the Appellant asserts, without further explanation, that the balancing test was erroneously conducted by the Commissioner. Further at §14 GA, the Appellant argues that the "*balancing test may be altered in favour of disclose [sic] by releasing limited information such as the number of operational sorties undertaken outside of Operation Shader without locational detail.*" As noted at paragraph 5.b above, the Tribunal lacks jurisdiction in respect of the Appellant's attempt to alter materially the Information Request in the hope that the balancing test consequently redounds in his favour.

30. The MOD advances compelling and very weighty arguments that the public interest in maintaining the exemption outweighs the public interest in disclosure of information responding to the Information Request. The MOD notes in particular:

    a. The Reaper platform is a strategic asset that fulfils a number of different missions for the UK military. Its use as a surveillance and reconnaissance asset, as well as strike asset, is well documented in the public domain. Reaper has also previously been confirmed as operating in the Middle East as part of Operation Shader.

    b. While Operation Shader is a counter-Daesh operation, other and/or future operations may depend on a greater degree of public ambiguity as to the employment of Reaper in order to be successful. It is therefore important to retain a degree of ambiguity regarding the full extent of RPAS operations now in order to maintain this flexibility in the future.

    c. Small amounts of information, which do not of themselves appear to be particularly damaging (and might even appear anodyne), can be combined by adversaries with other sources and information held by them. The mosaic effect, as a result of the requested information being combined with other information, poses both a short term and long term risk to the protection of UK forces and forces

cooperating with UK forces. The MOD regards the overall impact of the mosaic effect to be against the public interest.

d. Through both information publicly available about the UK's input to Operation Shader and other capacities available to adversaries in the region, it is highly likely that some adversaries have a general understanding of Reaper's operating profile. For those adversaries currently without a complex understanding of Reaper, the additional information requested by way of the Information Request could result in a significant improvement in the accuracy of and confidence in their understanding and assessment of UK operational capabilities.

e. The harm caused by adversaries combining information regarding Reaper falls to be understood in the following context. Future employments of Reaper and similar capabilities will be affected by adversaries' understanding of Reaper operations. The utility of Reaper and similar capabilities is in part dependent on the adversaries' uncertainty of both the capabilities and how the UK employs them. Additional information entering the public domain on how frequently and where the capability is or may be employed will allow a sophisticated adversary to improve its understanding of the capabilities of the platform and the UK's Tactics, Techniques and Procedures ("**TTPs**"). Significantly, a sophisticated adversary's improved understanding might enable it to take steps to develop countermeasures. For less sophisticated adversaries, additional information may provide a step change in their understanding and ability to limit their exposure to the UK's RPAS operations. This has the potential to limit the operational effectiveness of Reaper, and the ability of the UK to use this asset, both in support of personnel or in place of other capabilities.

f. Beyond this, withholding the requested information protects UK interests and personnel by denying adversaries confirmed knowledge about the activities of the UK armed forces. Withholding the requested information would also provide ambiguity that enables adversaries tacitly to ignore activities of the UK, if any, without being forced to respond (potentially in an escalatory way). This allows all sides freedom of manoeuvre to avoid unnecessary confrontation.

g. Reaper operations are frequently associated with wider military operations. Reaper is only employed where it will maximise strategic effect. If the MOD were to set a precedent of disclosing aspects of RPAS activity, then this in future may highlight or be suggestive of the employment of broader military capabilities. This, in turn, may provide an adversary with indications and warning of wider UK military activity and/or UK military presence.

h. The MOD further relies on the public interest factors identified at §23 of the Decision.

31. The Appellant's public interest arguments plainly do not outweigh the weighty submissions of the MOD and fall some way short of the "*very weighty countervailing considerations*" identified in Chris Cole v ICO and MOD (EA/2013/0042 & 0043) at §54. The Appellant's submissions allege that there is a lack of oversight over the use of Reaper: see §15-18 GA. However, the Appellant is incorrect to assert that there is a lack of adequate oversight of the use of Reaper. In particular:

a. The "*Joint Doctrine Publication 3-46: Legal Support to Joint Operations*" provides an overview of how legal advice informs decision making in a military context. Legal advice is provided by MOD Legal Advisers ("**MODLA**", part of the Government Legal Department). MODLA are able to consult the Attorney General's Office on matters of critical national interest. Military lawyers, who are part of the respective Services, are also available to provide advice to military commanders. As a consequence, legal advice is available in respect of decision making from the strategic level down, ensuring legal aspects are considered throughout the conception, planning and execution of military operations.

b. Alongside legal advice, policy advice and direction ensure that the UK aims to operate to higher standards than those required by law, in line with the UK's values and objectives.

32. Further as to §15 GA:

a. It is noted that the responses to the Parliamentary questions referred to at §15 GA accord with the reasons advanced by the MOD in this Appeal for not disclosing the requested information. For example, to the Parliamentary Question of Sir Ed Davey of 11 June 2020, James Heappey responded: "*REAPER is an intelligence, surveillance and reconnaissance platform. We do not comment on intelligence matters and I am therefore withholding the information as its disclosure would, or would be likely to, prejudice the capability, effectiveness or security of the Armed Forces.*" Consistency of approach to withholding the requested information and like information is necessary to minimise the mosaic risks described above.

b. The Appellant adopts the description of his submissions to the Commissioner concerning the public interest test at §§19-22 of the Decision. "*Public controversy*" was central to the Appellant's submissions, in which he contrasted "*controversial*" employments of Reaper associated with targeted killing operations and "*uncontroversial*" employments, such as "*training or test flights*". However, the Information Request would not demonstrate the purpose/s for which Reaper airframes were used, if any. Accordingly, the requested information will not illuminate the public debate in such a way as to distinguish "*controversial*" and "*uncontroversial*" employments of Reaper.

33. At §§16-17 GA, the Appellant refers to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions of 15 August 2020. The MOD notes:

a. Insofar as the Appellant quotes paragraph 24 of the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions of 15 August 2020 at §16 GA, the quoted observations are general in nature and do not purport to address the legal oversight of decision making in a military context in the UK.

b. Moreover, the Special Rapporteur at paragraph 26 of her Report cites extensive case-law of the European Court of Human Rights, including *Al-Skeini and others v. the United Kingdom* (Application No. 55721/07, Grand Chamber judgment of 7 July 2011) and *Al-Jedda v. the United Kingdom* (Application No. 27021/08, Grand

Chamber judgment of 7 July 2011), to demonstrate that courts might be capable of considering the legality of the use of RPAS.

c. Insofar as the Special Rapporteur has made certain recommendations, which are referred to at §17 GA, she is describing neither the current state of public international law nor of UK domestic law; rather, her recommendations are mere proposals reflecting her hope as to the approach to be adopted by parliaments globally. The Tribunal will be aware that the employment of the UK armed forces is prerogative power, in respect of which Parliament has no legally established role. Whilst the Special Rapporteur might favour a different constitutional model, her opinions should be afforded limited weight.

34. In the circumstances, the public interest firmly favours withholding the requested information.

c) Ground 3: sections 27(1)(a) and 27(1)(c) FOIA

(i) The legal principles concerning section 27(1) FOIA

35. Section 27(1) FOIA provides, so far as is material:

> *"(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, …"*

36. The operation of section 27(1)(a) was clarified in *Plowden v ICO* (EA/2011/0225 and 0228) and *APPGER*. At §56 of *APPGER*, the Upper Tribunal identified two elements: "*(a) would disclosure of the information be likely to prejudice international relations; (b) if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing it.*"

37. As to the first element, the principles identified in *Hogan v IC and Oxford City Council* [2011] 1 Info LR 588 apply. Paragraphs 23-25 above are also repeated. The exemption is engaged if disclosure is more likely than not to prejudice international relations, or if there is a very

significant and weighty chance of it, even if falling short of being more probable than not: *Muttitt v Information Commissioner and Cabinet Office* (EA/2011/0036) at §40.

38. As to the second element, paragraphs 20-21 above are repeated. Moreover, in *R (Lord Carlile of Berriew) v SSHD* [2014] UKSC 60, the Supreme Court recognised at §51 that a precautionary approach is generally required in dealing with potential threats to national security and public safety. The executive branch of Government has expertise and experience in relation to foreign policy matters as well as security matters which the Tribunal cannot match: see *Plowden* at §21 and *R (Mohamed) v SSFCA* [2010] EWCA Civ 65 at §131.

(ii) Response to the challenge concerning the Commissioner's failure to consider section 27 FOIA

39. Whilst it might have assisted the Appellant, the MOD and the Tribunal had the Commissioner addressed sections 27(1)(a) and 27(1)(c) FOIA, the Appellant is wrong to assert that the Commissioner erred in law in failing to do so. §23 of the Commissioner's Response is adopted by the MOD.

(iii) Response to the challenge alleging that the MOD was obliged to approach foreign states

40. By Ground 3, the Appellant additionally alleges that, had the Commissioner considered sections 27(1)(a) and 27(1)(c) FOIA, she ought to have held that the exemption did not apply on the basis that "*[t]here is no evidence that the MoD has approached the foreign states concerned and asked, in a neutral manner, whether they object to disclosure of the limited information sought.*"

41. The Appellant's contention has no basis in case-law or statute. Indeed, contrary to the Appellant's contention, the authorities at paragraphs 23-25 and 37 above demonstrate that a respondent can discharge its burden of proof under section 27(1) FOIA without demonstrating actual harm to the relevant interests in terms of quantifiable loss or damage; *a fortiori* without having to approach foreign states to demonstrate actual harm.

42. Further, the approach contended for by the Appellant imposes such an excessive burden on the MOD when relying on section 27(1) FOIA as to render the exemption nugatory in many cases. The enquiry suggested by the Appellant would likely of itself prejudice relations between the UK and the UK's interests abroad by calling into question the discretion of the UK.

43. The MOD has properly established that disclosure of the requested information would harm relations between the UK and other states, and the interests of the UK abroad, without resorting to eliciting express confirmation of relevant prejudice from foreign states. The MOD notes:

    a. There is not a clear division between the harm falling under section 27(1)(a) and 27(1)(c) FOIA. To a material degree, the harm which would result from disclosure overlaps and falls to be taken into account with respect to each provision.

    b. The UK military's ability to operate in pursuit of the UK's national interests depends on working with a range of partners from across the globe. Many of the UK's partners value the discretion of the UK in their relationships and activities. This discretion enables the UK to deal with partners who may not agree with each other, maintain close relationships through times of tension, and work in ways that may be deemed sensitive to partners. The MOD contends that disclosure of the information sought would reduce partners' willingness to cooperate with the UK, the effect of which would be that relations between the UK and other states would be harmed.

    c. Maintaining trust in relationships with other states is exceptionally important, not only for the UK`s reputation, but also for the ability of UK forces to operate both now and in the future. These relationships provide the UK with freedom of manoeuvre and action in various regions, and enable the UK to maintain willing partnerships that help achieve both the UK's and shared goals. The MOD contends that disclosure of the information sought would undermine mutual trust and therefore adversely affect the interests of the UK abroad.

44. In his GA, the Appellant has failed to identify public interest factors that would favour disclosure of the requested information in this case in the face of the significant harm to relations between the UK and other states, and the interests of the UK abroad resulting from disclosure.

IV. PROCEDURAL MATTERS

45. The MOD submits that an oral hearing is appropriate (contrary to §26 of the Commissioner's Response).

46. The MOD will make a Rule 14 application in due course. As noted at §13 of the Decision, the MOD provided the Commissioner with sensitive information in support of the application of the exemptions relied upon. The MOD intends to do likewise in this Appeal.

V. CONCLUSION

47. For the reasons given above and in the Decision, the MOD submits that the Appeal should be dismissed.

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