

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

OPEN SKELETON ARGUMENT OF THE MINISTRY OF DEFENCE

Suggested reading: (time estimate 2.5 hours)

1. The request dated 2 January 2020.
2. Decision Notice dated 4 January 2021 (“**the Decision**”).
3. Statements of case: Outline Grounds of Appeal dated 29 January 2021 (“**GA**”), the Information Commissioner’s Response dated 2 March 2021 (“**the ICO Response**”); MOD’s Response dated 19 May 2021 (“**MOD Response**”).
4. Evidence: Witness statement of Clive Lewis MP (“**Lewis MP**”); OPEN and CLOSED Witness statement of Group Captain James Beldon MBE dated 28 October 2021 (“**Beldon W/S**”); Witness statement of Chris Cole dated 29 October 2021 (“**Cole W/S**”).

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**”). [A53]¹ The information sought was

¹ References to the OPEN bundle are to the page numbers in the bottom right hand corner.

therefore as to both the number of sorties and the location/s of such sorties. The information sought would not reveal either the substance of any mission/s conducted during a sortie (e.g. intelligence, surveillance, reconnaissance, or armed support) or the legal context within which the sortie was purportedly conducted, including any legal advice received.

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”* 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 the MOD’s Response dated 19 May 2021. The MOD relies upon both the OPEN and CLOSED

witness statements of Group Captain James Beldon MBE, the Deputy Commander of the Royal Air Force's Intelligence, Surveillance, Target Acquisition and Reconnaissance ("ISTAR") Force. By the ICO Response, the Information Commissioner also submits that the appeal should be dismissed.

5. In broad summary:

- a. The Appellant has not had sight of the withheld information. His submissions as to its content and the implications of its disclosure are, accordingly, speculative to a material degree.²
- b. In any event, the public interest in disclosure is identified by the Appellant principally with reference to issues to which disclosure of the requested information would not be revelatory, including the allegation that the threshold for use of force has been lowered. By way of further example, having listed a number of "*wider questions*" at §77 of the Cole W/S, the Appellant concedes at §78: "*... any response to my information request will not answer these wider questions ...*"
[D120]
- c. 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. The Beldon W/S is relied upon in that regard. 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.
- d. 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

² See Cole W/S §54. **[D116]**

requested information being withheld. The MOD rely upon §§4-14 of the Beldon W/S in particular.

- e. 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. To the extent that the Appellant has, by the Cole W/S, sought to expand Ground 3 into a general challenge to the MOD's reliance on sections 27(1)(a) and 27(1)(c) FOIA, the MOD relies upon the description of the weighty prejudice caused by disclosure at §§18-24 of the Beldon W/S.
6. 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 the MOD's submissions in this appeal as to whether the number responding to the Information Request is zero or any greater number.³

II. FACTUAL BACKGROUND OF THE INFORMATION REQUESTS

7. The Tribunal is invited to read the OPEN and CLOSED Beldon W/S. Group Captain Beldon MBE is a highly experienced and expert officer with a clear understanding of the risks that would or would be likely to arise by disclosure of the requested information. In accordance with established case-law (see e.g. at §20 of the MOD's Response), Group Captain Beldon's evidence, including his opinions as to the risks arising from disclosure

³ It is noted that the Lewis W/S at §6 asserts that "In 2020, I became aware that the UK had deployed its armed Reaper drones on operations outside of Operation Shader (the name of the UK military operations to defeat ISIS in Iraq and Syria) but was refusing to give details of the location or purpose of the missions." Footnote 2 to the Lewis W/S cites an article in The Guardian dated 6 June 2020, which in turn cites the Information Request and Response dated 17 February 2020 in issue in these proceedings. Given that the MOD regards the number zero or any greater number as information responsive to the Information Request, it is not accepted that the Response dated 17 February 2020 provides a proper basis for Mr Lewis' assertion that RAF Reapers in fact flew sorties outside Operation Shader in 2019.

of the requested information, ought to be given great weight by the Tribunal and be preferred to Mr Cole's statements minimising such risks (see e.g. at §56 of the Cole W/S).

8. The Appellant relies on two witness statements: the Cole W/S and the Lewis W/S. The Cole W/S purports to set out an extensive narrative concerning, amongst other matters, the background to the use of Reaper airframes, alleged concerns as to their use and the threshold for use of armed force. Various assertions are made in that evidence, which will not be expressly challenged or admitted by the MOD in the course of these proceedings as the MOD has a policy of officially neither confirming nor denying their accuracy.
9. On 2 January 2020, the Appellant submitted the following requests for information to the MOD, of which the Information Request is at (6). **[A53]**

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?

10. By way of context and by way of summary of §§4-7 of the Beldon W/S:

- a. 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. Reaper's primary mission is to act as an Intelligence, Surveillance and Reconnaissance asset. Group

Captain Beldon observed that its secondary mission is to provide *“armed support to Forces on the ground and, if required, engage planned and emerging enemy targets in accordance with extant Rules of Engagement and Targeting Directives.”* Group Captain Beldon also clarified at §5 that *“Reaper has no automated means of releasing and guiding a weapon”*.

- b. 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.
 - c. 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. As noted at §6 of the Beldon W/S, *“the RAF’s Reaper Force has contributed to operations in Afghanistan, Iraq and Syria”*.
11. 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 provision of that information was consistent with the public statements regarding Operation Shader to which reference is made at paragraph 7 of the Lewis W/S.
12. As to the Information Request, 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 Response stated: **[B59-60]**

“Section 26 is a qualified exemption and therefore a public interest test has been conducted. If released, the information would provide the public with greater understanding of the operations of Reaper, however conversely it could put sensitive and protected individuals on operations at risk, providing the adversary with an advantage. Therefore, on balance I have decided to withhold the information. The level of prejudice has been set at the lower level of ‘would be likely’ to cause harm if released.

Section 27 is also a qualified exemption and therefore a public interest test has been conducted. Release of the information would provide insight into global military activity and relationships between the UK and other states, however diplomatic relationships could be undermined, putting UK interests abroad at risk if the information was released. Therefore, on balance I have decided to withhold the information. The level of prejudice has been set at the lower level of 'would be likely' to cause harm if released."

13. 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". The use of the subjunctive form in the Beldon W/S to describe prejudice ought to be understood as consistent with this assessment of the level of prejudice.
14. On 18 February 2020, the Appellant requested an internal review of the Response.
15. 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'."*
16. 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."*
17. 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.
18. On 4 January 2021, the Commissioner issued the Decision. So far as is material, the Commissioner reached the following conclusions:
 - 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.”* This finding is not challenged by the Appellant.

- 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)⁴ FOIA: see §26.

III. RESPONSE TO THE GROUNDS OF APPEAL

19. At the outset, the MOD notes that the Appellant refers to the following two matters in 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. The references to the proposed application can be disregarded accordingly.
- b. At §14 GA, the Appellant seeks to re-draft the Information Request. 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."* The Tribunal lacks jurisdiction in respect of the Appellant's attempt to alter materially the Information Request in the hope

⁴ The Decision erroneously refers to section 27(1)(b), rather than 27(1)(c) FOIA.

that the balancing test consequently redounds in his favour: the jurisdiction of the Tribunal under section 57 FOIA is parasitic upon section 50 FOIA and, in turn, the scope of the original Information Request.

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

20. 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: section 26(1)(b) was properly held to apply, as is clear upon consideration of the Beldon W/S, including at §§4-14. [D98-100]

21. Moreover:

- a. 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.
- b. 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. Further to *Birkett v Department for the Environment, Food and Rural Affairs* [2011] EWCA Civ 1606 at §58, 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.

b) Ground 2: the public interest test

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

22. 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."

23. Section 26 is a qualified exemption. The MOD relies on the description of the legal principles relevant to the application of section 26(1)(b) at §§18-27 of the MOD Response [A44-45] and §§7-11 of the ICO Response. [A24-25] The MOD notes in particular that (i) 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 that "[a]ppropriate 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", and (ii) 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)."

(ii) Response to the challenge

24. 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.

25. 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 factors identified at §30 of the MOD Response, to which the Tribunal is invited to have particular regard.
 - b. The facts and matters at §§11-17 of the Beldon W/S.
26. 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 as being required in *Chris Cole v ICO and MOD* (EA/2013/0042 & 0043) at §54. The Appellant's submissions principally allege that (i) there is a lack of oversight over the use of Reaper airframes (see §15-18 GA and §§8-9 of the Lewis W/S [D92-93]); and (ii) the use of Reaper airframes "*is changing the use of armed force*" by the lowering of relevant thresholds (see Cole W/S at §46 [D113] and §69 [D118]). Both assertions are incorrect. In particular:
- a. As observed at §7 of the Beldon W/S: "*While some perceive Reaper to represent a completely new way of operating, it is in fact subject to the same rules, constraints and control as all conventional aircraft in the RAF's fleet. This means it is subject to both the same permissions processes for its intelligence collection and weapons employment activities, including the same Rules of Engagement that would apply to any other UK military aircraft.*" The speculative assertions of Mr Lewis MP at §8 that "*they are lowering the threshold for the use of force*" and of Mr Cole at §30 that "*[i]t is, in my opinion, probable that in both cases the technology itself had an impact on resort to force calculations*" are thereby addressed by Group Captain Beldon. In any event, the circumstances in which any sortie might have been authorised would not, in any event, be established by disclosure of the withheld information.
 - b. 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. The unattributed allegations concerning a lowering of the threshold for the use of force described, for example at §8 of the Lewis W/S, ignore the role and advice of MODLA.

- c. 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.

27. Further in response to the Appellant's pleaded case at §§16-17 GA:

- a. Consistency of approach in the responses to the Parliamentary questions referred to at §15 GA by withholding the requested information and like information is necessary to minimise the mosaic risks described above. The references to Hansard at §7 of the Lewis W/S reflect that consistent approach to withholding information and tend in favour of the maintenance of the exemptions relied upon by the MOD accordingly.
- b. The Information Request would not demonstrate the purpose/s for which Reaper airframes were used, if any: paragraph 1 above is repeated. This is accepted by Mr Cole at §60 of the Cole W/S: "*[s]tatistical data about annual number of sorties and/or broad locational detail ... allows plenty of ambiguity about purpose to which Reaper is being put ...*" Accordingly, the requested information will not illuminate the public debate in such a way as to distinguish (what the Appellant refers to as) "*controversial*" and "*uncontroversial*" employments of Reaper, nor would it identify whether Reaper airframes, if used at all, had been used for their primary or secondary purposes (c.f. Cole W/S at §§31-36).
- c. Limited weight should be given to the references to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions of 15 August 2020 for the reasons at §33 of the MOD's Response.

d. Although the Appellant places reliance on the Public Administration and Constitutional Affairs Committee's ("**PACAC**") report of 6 August 2019 at Cole W/S §§39-45, it is notable that the PACAC drew a distinction between "*the principle of how special forces and drones are utilised*" and "*specific instances of deployment*". The Information Request exclusively concerns the latter, as to which PACAC concluded "*specific instances of deployment cannot be debated openly*". PACAC's conclusion accords with the MOD's reliance on sections 26(1)(b), 27(1)(a) and 27(1)(c) FOIA in this case.

28. 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

29. 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, ..."

30. 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.*"

a. As to the first element, the principles identified in *Hogan v IC and Oxford City Council* [2011] 1 Info LR 588 apply. 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. The first element is not understood to be in dispute in these proceedings.

- b. As to the second element, 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

31. 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

32. By Ground 3, the Appellant 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.*"

- a. The Appellant's contention has no basis in case-law or statute. Indeed, 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.
- b. 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.

33. 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 relies on §§18-24 of the Beldon W/S and §43 of the MOD Response.

34. To the extent that Ground 3 has now been recast as a general challenge to the MOD's reliance on sections 27(1)(a) and 27(1)(c) FOIA, the MOD rely upon §§18-24 of the Beldon W/S. Against that compelling evidence, the Appellant has failed to identify weightier 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. At §66 of the Cole W/S, the Appellant fails to advance of positive case. The Appellant's argument on this point is, instead, captured at §§9 and 12 of the Lewis W/S: as a matter of Mr Lewis' own subjective opinion and without sight of the withheld information, he speculates that the "*the public interest in the need for greater transparency and accountability over the use of unmanned aerial vehicles by the UK government outweighs this argument*".

IV. CONCLUSION

35. The MOD intends to supplement these OPEN submissions in the CLOSED session, as necessary. The MOD submits that the Appeal should be dismissed.

STEPHEN KOSMIN

11KBW

22 February 2022