



IAC-AH-KRL-V1

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights**

Appeal Reference: EA/2016/0290

**Heard at Field House
On 11 July 2017**

Before

**JUDGE PETER LANE
PAUL TAYLOR
ANNE CHAFER**

Between

CHRIS COLE

Appellant

and

**THE INFORMATION COMMISSIONER (FIRST RESPONDENT)
THE MINISTRY OF DEFENCE (SECOND RESPONDENT)**

Respondents

Representation:

For the Appellant:	In person
For the first Respondent:	Robin Hopkins, Counsel, instructed by the Solicitor for the Information Commissioner
For the second Respondent:	Mr Christopher Knight, Counsel, instructed by the Government Legal Department

DECISION AND REASONS

A. Reaper Drones

1. This appeal concerns the British military use of Unmanned Aerial Vehicles (UAVs), commonly known as drones. The appellant is the founder of Drone Wars UK, an

NGO which undertakes research, education and campaigning on the use of UAVs, as well as the wider issue of remote warfare.

2. The UAVs with which we are concerned are the MQ-9 Reaper Remotely Piloted Air System (RPAS). The RAF's Reaper fleet (or "platform") was originally brought into service during Operation HERRICK, the code name for the United Kingdom's contribution to the campaign in Afghanistan in support of the International Security Assistance Force (ISAF) mission. It currently supports Operation SHADER, which comprises the United Kingdom's contribution to Operation INHERENT RESOLVE (OIR). This is the US-led campaign to defeat a group, which has called itself the Islamic State or the Islamic State of Iraq and the Levant, but which is referred to by the second respondent as "Daesh", a name which the group dislikes, on account of its similarity to the Arabic word for a sewer of discord.
3. The MQ-9 Reapers are controlled at all times either from the US or the UK by a qualified RAF pilot, using ground and satellite based data-links.
4. Group Captain Mark Flewin works in the UK's Permanent Joint Headquarters, where his job involves:-

"Supporting the delivery of lethal and non-lethal effect in support of UK deployed operations. Within my post I am responsible for integrating and managing Information Operations, Cyber, Electro-magnetic and kinetic effect, to deliver a Full Spectrum Targeting operational hub in support of all UK deployed Operations, where necessary integrated with the Coalition construct".

5. The passage just quoted comes from the "open" witness statement of Group Captain Flewin. We shall return to his evidence in some detail in due course. At this point, however, it is helpful to record what he has to say about the nature of the RAF's Reapers and the reasons they are currently being used in Iraq and Syria in operations against Daesh:-

"The Reaper's primary mission is to act as an Intelligence Surveillance and Reconnaissance (ISR) asset, employing a multitude of sensors to provide real-time data to military commanders and intelligence specialists. The aircraft's secondary mission is to provide armed support to Forces on the ground and, if required, engage emerging enemy targets in accordance with extant rules of engagement and targeting Directives. The aircraft's primary sensor is a full motion video camera that is effective at collecting detailed imagery at significant stand-off ranges. The heights at which the Reaper normally operates make it relatively undetectable by enemy Forces across the Joint Area of Operations (JOA), allowing the platform to collect a variety of real-time intelligence information regarding their activities.

7. Reaper Air to Surface munitions include the GBU-12 – a 500 lb Laser Guided Bomb (LGB); and the Hellfire air to surface missile – a 100 lb low collateral Laser Guided Missile (LGM). Both weapons types have been cleared by the UK for combat use and all weapons can only be released by a qualified pilot in control of

the aircraft, guided to their designated target by the sensor operator; the aircraft has no automated means of releasing and guiding a weapon.”

B. The appellant’s requests for information

6. We can now turn to the appellant’s requests. On 1 March 2016, he asked the second respondent for the following information:-
 - “a) How many RAF Reaper UAVs ... are engaged in operations against ISIL/Daesh in Iraq and Syria at today’s date (1 March 2016)?
 - b) At which bases are the UK’s Reaper fleet currently deployed to at today’s date (1 March 2016)? If you do not wish to give the exact location for security reasons, please can you detail their location by country?”
7. We should mention that the appellant had a third question, regarding RAF aircraft flights over Libya, which it is now agreed forms no part of the present proceedings.
8. The second respondent informed the appellant on 31 March 2016 that it declined to answer his questions regarding the Reapers, on the basis that the requested information was exempt from disclosure by reason of sections 26 and 27 of the Freedom of Information Act 2000 (FOIA). So far as relevant for present purposes, these provisions provide as follows:-

“Defence

- 26 (1) - Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice -
 - (a) the defence of the British Islands or of any colony, or
 - (b) the capability, effectiveness or security of any relevant forces.
- (2) In subsection (1)(b) ‘relevant forces’ means -
 - (a) the armed forces of the Crown, and
 - (b) any forces co-operating with those forces,or any part of those forces.

.....

International Relations

- 27 (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, or

(d) the promotion or protection by the United Kingdom of its interests abroad.

(5) In this section -

.....

‘State’ includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom”.

9. The exemptions in sections 26 and 27 are “qualified” ones. This means that, even where the relevant provision is formally engaged, the information in question will be exempt information only if or to the extent that “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)).
10. The appellant was not satisfied with the second respondent’s decision to withhold the information. He requested an internal review of the decision. The review confirmed that sections 26(1)(b) and 27(1)(a) were being applied to the requests and that the second respondent could not supply the appellant with its full reasoning because to do so would involve the disclosure of the information considered to be exempt.
11. The appellant complained to the first respondent about the second respondent’s handling of his complaint. In her decision notice of 8 November 2016, the first respondent set out the criteria she considers must be met in order for section 26 to be successfully invoked by a public authority:-
 - (i) the actual harm that it is said would or would be likely to occur, if the withheld information was disclosed, must relate to the applicable interests within the relevant exemption;
 - (ii) the public authority must demonstrate some causal relationship exists between the potential disclosure of the information and the prejudice which the exemption is designed to protect;
 - (iii) the resultant prejudice must be real, actual or of substance; and

- (iv) disclosure must be likely to result in prejudice, if it would not actually do so. In other words, if the likelihood of prejudice occurring is merely hypothetical or remote, then the exemption will not be engaged.
12. The second respondent, in its internal review response, said that disclosure of the information requested in questions (a) and (b) would be likely to assist opposing forces in building up a detailed picture of UK tactics and strike capabilities. Enemy forces could then adjust their efforts, training, tactics and planning activities to exploit the likely use (and any perceived limitations) of UAV operations, including Reaper, for both the UK and other nations that use them. The enemy would also be able to develop better measures to counter the UAVs. The second respondent confirmed that the exemption was at what was described as the “lower level” of “would be likely to” prejudice. More detailed submissions to support the second respondent’s stance were made to the first respondent. These submissions could not be recorded in the decision notice, as to do so would reveal information “that is itself exempt from disclosure”.
13. The appellant submitted that a number of factors undermined the position of the second respondent regarding section 26, that disclosure of the withheld information would be likely to prejudice the capability, effectiveness or security of UK forces. The appellant noted that the second respondent had released details of the numbers of other UK military aircraft engaged in military operations against Daesh; that the second respondent had regularly stated that Tornado, Typhoon and other UK military aircraft are based at, and undertaking missions against Daesh from, RAF Akrotiri in Cyprus; the second respondent quite happily released the number of Reaper UAVs engaged in combat operations against the Taliban in Afghanistan and the location of their then base (Kandahar Airfield); the second respondent regularly publishes updates on UK air military operations in Iraq and Syria, including details of airstrikes carried out by Reapers and other aircraft which, it could be said, gives a greater insight into tactics and strike capabilities and the number of aircraft deployed; in May 2016 journalists from *The Sun*, *Sky News* and *The Daily Signal* were invited to visit the location of at least some of the UK’s Reaper drones and, although the location of the base was not directly mentioned, enough information was disclosed in the ensuing press reports to identify the location of the base; finally, the second respondent had put part of the withheld information in the public domain in the form of comments from the Secretary of State for Defence on 4 June 2015 to reporters, in which he confirmed that all ten British Reapers were deployed. According to the appellant, the release of this information had not been shown to prejudice section 26(1)(b) interests.
14. The first respondent adopted the following position. She accepted that the type of harm the second respondent believed likely to occur if the information was disclosed was applicable to interests protected by section 26(1)(b). She was satisfied also that disclosure “clearly has the potential to harm the capability and effectiveness of UK forces and operations against Daesh” and that there was accordingly “a causal link

between the potential disclosure of the withheld information and the interests which section 26(1)(b) is designed to protect”.

15. The first respondent was satisfied that the resultant prejudice could correctly be categorised as “real and of substance”. The first respondent concluded that “disclosure could result in prejudice to the capability, effectiveness or security of British Armed Forces”.
16. Instead of being merely “hypothetical”, the first respondent concluded that there was “a real and significant risk” of relevant prejudice occurring. Although she could not set out any detail in the decision notice, “she wishes to emphasise that she has considered, and paid particular attention to, the specific points advanced by” the appellant. The first respondent had formed the view that “there are a number of significant differences between the information previously and proactively disclosed by the MOD about its operations against Daesh in Iraq and Syria, and the use of Reapers in Afghanistan, and the nature of the withheld information in this case”.
17. The first respondent accordingly was satisfied that the withheld information was exempt from disclosure on the basis of section 26(1)(b). She then moved to consider whether in all the circumstances the public interest in maintaining the exemption outweighs the public interest in disclosing it.
18. On this issue, the first respondent noted that the second respondent had itself acknowledged that disclosure would increase public understanding of how UK Armed Forces are deployed, thereby increasing public confidence and trust in overseas operations. Furthermore, the appellant pointed to considerable national and international public disquiet about the use of armed drones to undertake covert lethal operations outside the context of what were described as conventional armed conflicts. In August 2015, the Prime Minister had told the House of Commons that the UK had used one of its Reapers to target and kill suspected terrorist Reyaad Khan. The Prime Minister confirmed that this operation was “a new departure” for the UK. He also said that other such operations were likely.
19. The appellant noted that the killing of Reyaad Khan was said by the second respondent not to be part of Operation SHADER. The House of Commons should have the opportunity to debate any proposed use of military force, except in an emergency. The acceptance of that proposition over the past decade constituted acceptance of proper public accountability and oversight over British military force. Thus, a blanket policy of refusing details of the number of Reaper drones on operations or their location enables those drones to be put to covert use, thereby preventing right for public oversight. The appellant concluded that there was, as a result, a compelling public interest in disclosing the withheld information.
20. In carrying out the public interest balance, the first respondent recognised that there “are legal and ethical considerations in the use of UAVs. She therefore agrees that there is a public interest in the disclosure of information which would inform and

further a public debate about the use of such weapons by UK Armed Forces". The first respondent accepted that release of the information could go "some way to informing that debate". Nevertheless, the first respondent considered that caution should be deployed in placing too much weight on the public interest in disclosure of this particular information. It was relatively limited in nature and there was a consequential limit on the utility of the information in informing a debate about the use of UAVs.

21. By contrast, there was in the view of the first respondent "an exceptionally strong public interest in protecting the capability, effectiveness and security of British Armed Forces". Accordingly, the first respondent considered that there would need to be "an exceptionally compelling case for the public interest in disclosure of the information, which in her view there is not".
22. The first respondent accordingly reached the conclusion that the public interest favoured maintaining an exemption in section 26(1)(b). In the light of that decision, she did not consider the second respondent's reliance on section 27(1)(a).

C. The appeal

23. The appellant appealed against the first respondent's decision. The appeal was heard on 11 July 2017. The appellant represented himself (very ably). The first and second respondents were respectively represented by Mr Robin Hopkins and Mr Christopher Knight, of Counsel. The Tribunal heard oral evidence from Group Captain Flewin, both in "open" and "closed" session.
24. In "open" the Group Captain adopted his witness statement. We have already had cause to refer to this. Group Captain Flewin set out his career, to date, at the beginning of his statement. He has piloted fast-jet front-line aircraft, later becoming responsible for both day-to-day tasking and long-term planning for all UK air fixed-wing elements in Iraq and Afghanistan. This included the integration of the UK RPAS within coalition operations. He has also commanded Number One (Fighter) Squadron.
25. Before joining Permanent Joint Headquarters, Group Captain Flewin served in the Ministry of Defence during the period of the 2015 Strategic Defence and Security Review, being deployed overseas to establish 903 Expeditionary Air Wing in support of Operation SHADER, commanding five disparate aircraft types and 450 people, including combat air assets, in support of Operation INHERENT RESOLVE.
26. So far as the appellant's question (a) is concerned, the Group Captain says:-

"Militarily, we do not discuss numbers of UK or Coalition aircraft employed, on specific days, or in support of specific operations, as to do so would breach operational security guidelines. This would unnecessarily expose UK and Coalition capabilities,

and potentially inadvertently release sensitive information which could be exploited by our enemies to their benefit”.

27. In this regard, Group Captain Flewin points to the Secretary of State for Defence as having stated publicly that:-
- “Any military action that we may take in respect of imminent threats to the United Kingdom is not, as you have probably discovered, particular to any type of weapon or type of aircraft. It might involve the use of manned aircraft, unmanned aircraft, a missile from a ship or whatever. There is nothing special about the use of unmanned aircraft in this respect” (House of Commons’ Joint Committee on Human Rights: oral evidence: Wednesday, 16 December 2015; HC 574).
28. The Group Captain next considers the nature of the enemy, in the shape of Daesh. He describes coalition activities to seize the city of Mosul, which Daesh had captured in October 2014. The coalition is also starting “to close in on Raqqa – the *de facto* capital of the self-styled ‘Caliphate’ – Daesh’s tactics are becoming ever more desperate, where they will exploit any information regarding coalition capabilities to their advantage”. Group Captain Flewin considers that those desperate tactics will “only become more prevalent as we close on the kernel of Daesh, where tactics and information exploitation are likely to become more important to the enemy ...”. He considers that release of the figure requested in question (a) would disclose information on the capability and capacity of coalition forces to support extensive counter-Daesh operations in both Iraq and Syria.
29. Furthermore, Group Captain Flewin says that “hostile or non-aligned foreign intelligence agencies could also exploit the information to analyse the UK’s military capability and readiness for dealing with contingencies outwith the Iraq and Syria areas of operation”. Thus, the dangers involved in disclosing the information are, he says, not limited to the current operational environment alone.
30. The information which the second respondent releases, concerning RPAS operations, is said by Group Captain Flewin to be “in the form of strike statements outlining operational activity undertaken by UK air assets”. This is released through the second respondent’s open source website and includes information on both manned and unmanned platforms. He says that each of these releases “is carefully assessed to ensure that operational security can be maintained, whilst meeting the aim of informing public debate and upholding the Secretary of State’s commitment to transparency”.
31. Details of airstrikes carried out for Operation SHADER are routinely published online by the second respondent, as well as details of weapons usage and enemy casualties, when requested through channels such as FOI requests or parliamentary questions. A great deal of work is, however, undertaken to ensure that the level of detail released does not impact upon operational capabilities or provide enemies with a tactical advantage.

32. The statement then turns to question (b), concerning the location of the Reapers on the day in question. The Group Captain considers that, since the UK is “a critical contributing nation to the US counter-Daesh Operation INHERENT RESOLVE, the release of this information could result in the withdrawal or limitation of the support currently provided to UK Armed Forces. That in turn could seriously impair the UK’s ability to conduct operations in the Middle East region and support its coalition partners in the Gulf. That, in turn, could affect the willingness of those partners to support the UK in future operations”.
33. Finally, Group Captain Flewin turns attention to the permitted visit of journalists to a Reaper base. He says the journalists operated within specific MOD parameters and had not released the exact location of the base. Reference is made to the second respondent’s direction on media, set out in a “Green Book”.
34. Cross-examined by the appellant, Group Captain Flewin was asked about the news story issued on the gov.uk website entitled “Defence Secretary visits UK personnel taking the fight to Daesh”. This recorded Defence Secretary Michael Fallon meeting “personnel from 903 Expeditionary Air Wing who are flying daily missions over Iraq and Syria as the UK plays a leading role in coalition operations”. The meeting took place at RAF Akrotiri, Cyprus, described in the story as having been “home to extensive air capabilities since coalition air operations began in September 2014”. The air capabilities were said to include Voyager air-to-air refuelling aircraft, C130 transport aircraft and Sentinel surveillance aircraft. In addition “two Tornados joined the existing eight earlier this week and six Typhoon aircraft were introduced to more than double Britain’s strike capability with missions”.
35. Group Captain Flewin was asked whether this was not information of the same character as requested by the appellant in question (a). He replied that it was not. These were, he said, generic numbers, rather than specifics in terms of the number of platforms deployed in specific operations.
36. Group Captain Flewin said that the second respondent was “holding a line” on not releasing the numbers of aircraft in operation on specific days. That comprised “fine detail”, which would not be published. There was also a “line” being held by the second respondent in relation to Reaper UAVs; but he could not go into details on this in “open”.
37. The appellant drew the attention of the witness to materials at pages 92, 94 and 96 of the bundle. On page 92, the Parliamentary Under Secretary of State, Lord Astor of Hever, answered a Parliamentary question on 30 October 2012. The Minister set out, in tabular form, the second respondent’s “in-service Remotely Piloted Air Systems by number of aircraft and type currently deployed in support of UK operations within Afghanistan”. For “Reaper” the number “5” was given. The Reaper was said to be a “remotely piloted aircraft ... armed with precision guided weapons.” The Reapers’ targets were said always to be “positively identified as legitimate military objectives,

and attacks are prosecuted in strict accordance with the law of armed conflict and UK ROE" (rules of engagement).

38. At page 94, the second respondent, in a letter dated 17 March 2014 to Drone Wars UK, stated that the UK "currently has five Reaper Remotely Piloted Aircraft in service. Four of these are operationally deployed in Afghanistan and one is undergoing corrective maintenance".
39. At page 96, an extract from the RAF's website, photographs of Reapers were shown under the heading "more RAF Reapers to take to the skies". The item, dated 3 July 2014, stated that "the RAF's newest Reaper remotely piloted aircraft have begun operations in Afghanistan."
40. The appellant then filed three documents. The first, from gov.uk, dated 5 April 2011, related to the campaign over Libya. The Prime Minister, David Cameron, "also announced the deployment of four more Tornado fighters to the base [Gioia Del Colle, Italy] to assist the military effort, taking the total deployment to ten Typhoons and twelve Tornados engaged in enforcing a no fly zone and carrying out ground attacks respectively".
41. The second document, dated 20 July 2011, refers to "four Royal Air Force Tornado GR4 fast jets" arriving "at Gioia Del Colle Air Base in southern Italy to provide further support to UK operations over Libya". Later in the same article we find:-

"Crews from 2 (AC) Squadron, based at RAF Marham in Norfolk, have been operating the 12 Tornado GR4 aircraft already based at Gioia Del Colle since May 2011.

There are also six Typhoon jets deployed alongside the Tornado GR4s, currently occupied by personnel from 3 (Fighter) Squadron, RAF Coningsby".
42. The third document was a BBC News report of 9 January 1999, regarding a visit to British troops in Kuwait by Prime Minister Tony Blair. The article stated that there were twelve RAF Tornado GR1s in Kuwait "as part of Britain's continuing effort to patrol the skies over Iraq". An insert titled "Britain in the Gulf" listed the numbers of Tornados in Kuwait and their base (Ali Al-Salem), two VC10 air to air refuelling tankers being based in Bahrain and six Tornado GR1s at the Al-Khaj Air Base in Saudi Arabia.
43. Group Captain Flewin said that the second respondent continues to release as much material as it can. However, no two operations were the same. Furthermore, over a span of eighteen years, situations could and did change. There was, in particular, a difference between the Afghanistan campaign and the current anti-Daesh operations. Daesh were a much more sophisticated enemy than the Taliban. The latter had been essentially "kinetic" in nature. Daesh, by contrast, was a more complex entity. As a result, the second respondent needed to alter its approach to the disclosure of information. Daesh were particularly active in "cyberspace" and in relation to online

radicalisation. They were able to piece together information regarding the UK's capabilities.

44. Although the second respondent applied the same rigorous processes as it had during the previous campaigns and tried to release as much information as it could, it had to ensure that nothing was revealed that could assist the enemy.
45. The appellant pressed the witness to explain the reason why information regarding strikes carried out by UK forces could be released, with the result that one could ascertain that, for instance, two or three sorties were flown per day, whereas the requested information could not be disclosed. Group Captain Flewin said that missions, sorties and platforms were each very different; and so, for example, information regarding the number of sorties delivered in a particular time period was materially different from information regarding resources available in that period.
46. The appellant referred to a letter he had written to the Secretary of State for Defence on 21 January 2015, asking the Secretary of State to set out as clearly as possible the reasons why the second respondent had decided not to give the location of UK Reapers since the end of Operation HERRICK. The answer, given in a letter from the Permanent Joint Headquarters, dated 2 March 2015, was as follows

"In Afghanistan there were a large number of air assets contributing to the overall ISAF mission. Given this, we were able to release information on UK Reaper assets as this did not compromise capabilities by giving an indication of the level and area of coverage. As we drew down in Afghanistan, disclosing the capability in each location could have disclosed potential capability gaps which could have compromised security; this is when the UK ceased to release this information.

On Op SHADER, releasing the location of UK Reapers could disclose capability gaps and compromise security. Furthermore, for the protection of the other nations involved, the UK does not divulge their location in accordance with FOI qualified exemption section 27 – international relations".

47. Group Captain Flewin agreed that there were, in fact, a large number of air assets operating over Iraq and Syria. He stressed, however, that the UK was facing a different kind of enemy at the present time.
48. The appellant asked the witness whether releasing the requested information in respect of a period of one month, rather than one day, would be acceptable. Group Captain Flewin said that the second respondent had considered this but regarded the problems he had identified as still existing.
49. Re-examined, the Group Captain was asked whether he could say anything in "open" regarding the section 27 (international relations) exemption, relied upon by the second respondent. He replied that the UK relies on the US for its Reapers, which are US-made. The UK was aware of the views of the US regarding what

information the latter considered it appropriate to release regarding Reaper operations. It was extremely important for the UK to maintain a close relationship with the US in the present context. The US would tell the UK what it would be comfortable with, in terms of information release.

50. In answer to a question from Mr Hopkins, Group Captain Flewin agreed that the passage of time could affect the sensitivity of the information so that, after a certain period, the requested information could be released without damaging section 26 interests. Group Captain Flewin stated, however, that one year would not be enough although "decades may be different".
51. The Tribunal then went into "closed" session, during which it heard evidence from Group Captain Flewin. The following gist of that session was given by the Tribunal to the appellant, upon the resumption of the "open" session:-

"During the course of the closed session, Group Captain Flewin was asked questions and invited to address certain topics. These included:

- (a) the distinction between generic numbers and specific deployment numbers;
- (b) the particular capabilities and threat posed by Daesh;
- (c) the distinction between manned and unmanned platforms;
- (d) the nature of the harm to international relations arising from part A [i.e. question (a)];
- (e) whether the USA had been given an effective veto over disclosure;
- (f) the extent to which Daesh could have guessed the answers to parts A and B [i.e. questions (a) and (b)]; and
- (h) other elements of the closed statement.

None of the evidence given in response by the witness can be given in 'open'".

52. We would further add that neither Counsel made any submissions in "closed" and that (to answer a question from the appellant) neither sections 23 nor 24 of FOIA featured in that part of the hearing.

D. Discussion

(1) The law

53. It is necessary to begin our analysis with an iteration of the relevant law. Both section 26 and section 27 require two findings to be made, if the information in question is to be withheld compatibly with section 2. First, disclosure must be shown

to be likely to prejudice, as the case may be, the capability, effectiveness or security of any relevant forces or relations between the United Kingdom and any other State. Each section can also be “triggered” by a finding that disclosure would prejudice the relevant interests. However, it is common ground in the present case that the claimed prejudice as regards both sections relates to the likelihood of the harm in question occurring.

54. The appellant seeks to derive support from the fact that the respondents rely only on likelihood. The fact of the matter is, however, that, as regards both section 26 and 27, likelihood of prejudice has been placed by the legislature on a par with the occurrence of prejudice. It is also noteworthy that the legislature has not referred to the prejudice as being “more likely than not” to occur. The required likelihood, accordingly, is not that the feared prejudice is the most likely outcome.
55. It is for the Tribunal to decide, on all the evidence, whether section 26 or section 27 prejudice is likely. In reaching its decision, however, the Tribunal must ascribe appropriate weight to the considered position of the public authority concerned. This point has been made judicially on a number of occasions: see e.g. APPGER v Information Commissioner and Ministry of Defence [2011] UKUT 153 (AAC) and Savic v Information Commissioner, Attorney General’s Office and Cabinet Office [2016] UKUT 535 (AAC). At the highest level, albeit in an appeal involving Article 10 of the ECHR, the Supreme Court in R (Lord Carlile of Berriew and Others) v Secretary of State for the Home Department [2014] UKSC 60 has held that the weight to be given to the views of government in assessing likely reactions of foreign States to a particular decision can be considerable. At paragraph 46 of the judgments, Lord Sumption said:-

“The future is a foreign country, as L P Hartley almost said. They do things differently there. Predicting the likely consequences of a step which the evidence suggests will be viewed in Iran as a hostile act, cannot be a purely analytical exercise. Nor can it turn simply on extrapolation from what did or did not happen in the past. There is a large element of educated impression involved ... the consequences of a failure to engage with this complex and unstable society are sufficiently serious to warrant a precautionary approach. It is the proper function of a professional diplomatic service to assess these matters as best they can. It follows that the only reasonable course which the Home Secretary could have taken ... was to draw on the expertise of the Foreign Office, as she did ... this court is no better and arguably worse off in that respect than she was. We have no experience and no material which could justify us in rejecting the Foreign Office assessment in favour of a more optimistic assessment of our own. To do so would not only usurp the proper function of the Secretary of State. It would be contrary to long established principle which this court has repeatedly and recently reaffirmed.”

56. Lord Neuberger, at paragraph 75, said:-

“I agree that the feared outcome is uncertain, but I do not consider that that factor takes matters any further ... the very fact that the feared outcome is uncertain appears to me, if anything, to emphasise why a court is not in a position to challenge the

conclusion reached by the Home Secretary. The Foreign Office is the best equipped organ of the state to assess the likely reactions of a volatile foreign government and people, and while it would be an overstatement to say that a domestic court is the worst, it is something of an understatement to say that it is less well equipped to make such an assessment than the Foreign Office”.

57. Although the Lord Carlile case concerned a judicial review, rather than an appeal, the Supreme Court has recently stressed the significance of giving appropriate weight to the views of a government minister, in the context of an appeal: Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60, paragraphs 45 and 46. The Supreme Court re-emphasised the importance of the judgments of the House of Lords in Huang v Secretary of State for the Home Department [2007] 2 AC 167; in particular, the following from the judgment of Lord Bingham:-

“Giving effective weight to factors such as these is not, in our opinion, aptly described as deference; it is the performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with the responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational decision-maker is likely to proceed” (paragraph 16).

58. Turning to the issue of the public interest balance, the structure of sections 2, 26 and 27 of FOIA makes it evident that a finding of likely prejudice to a stated interest will not be dispositive of where the balance falls to be struck. If it were, then sections 26 and 27 would be absolute, rather than qualified, exemptions. The weight to be given to the view of the public authority, where that view directly derives from the special characteristics of that authority, will inform, to an appropriate extent, the way in which the first respondent and, if necessary, the Tribunal will strike the balance. At this stage also, in the words of Lord Bingham, deference is inappropriate. Having ascribed a weight to the views of the public authority that is, in all the circumstances, considered by the Tribunal to be appropriate, the Tribunal must rule in favour of disclosure if it finds that that weight is not greater than the weight to be ascribed to the public interest in freedom of information, as established by section 1.

(2) Question (a): is section 26 engaged?

59. The appellant’s question (a) – “how many RAF Reaper UAVs are engaged in operations against Iraq and Syria at today’s date (1 March 2016?)” – was addressed by Group Captain Flewin. His evidence can be categorised as follows. Answering question (a) would be likely to prejudice the capability, effectiveness and security of UK forces engaged in anti-Daesh operations as part of Operation INHERENT RESOLVE because:-

- (i) the answers would provide an insight into the RAF’s capabilities and activities, which is not disclosed by what might be described as the “generic” information that has been released, regarding numbers of aircraft, etc. generally deployed to

theatres of operations; and which is also different from information released, after the event, regarding sorties (that is to say, specific UAV or other airborne missions):

- (ii) Daesh is a significantly different kind of enemy than that encountered in Operation HERRICK in Afghanistan. Compared with the Taliban, Daesh is able to use information technology in a way that creates a real risk of them being able to make significant use of the answer to question (a), including by correlating the information with other information that Daesh has obtained;
- (iii) quite apart from (i) and (ii) above, there is a particular risk in releasing the answer to question (a) above, in that there are particular sensitivities regarding information about Reaper UAVs, as opposed to information about piloted aircraft.

60. We are satisfied that it is necessary to attach significant weight to the views of the second respondent, as articulated by Group Captain Flewin, both as regards the question of whether section 26(1)(b) is engaged and as regards the significance of the likely prejudice, which falls to be balanced against the interest in disclosure of the information. Group Captain Flewin plainly has very considerable expertise in this area. Despite skilful cross-examination by the appellant, his evidence remained coherent.
61. So far as issue (i) above is concerned, the second respondent has put forward a sufficient case of likely prejudice to the interest described in section 26(1)(b). There is, we find, a material difference between the evidence, upon which the appellant relied, regarding disclosed information relating both to Operation HERRICK and Operation INHERENT RESOLVE, and the information that would be elicited by answering his question (a).
62. We find that Group Captain Flewin is correct to distinguish between what he described as the generic information relating to deployment of UAVs by the RAF under Operation SHADER, without reference to specific dates (or, indeed, other specific time periods), and the request to know how many RAF Reaper UAVs were actually engaged in operations under Operation SHADER on a particular date (or, for that matter, other time period). Indeed, the appellant's pursuit of an answer to question (a) underscores this point.
63. In so finding, we agree with the appellant that there is, on analysis, no support for the second respondent's earlier assertion (in correspondence with Drone Wars UK) that the numerical difference between weaponry deployed in Operation HERRICK and Operation SHADER constitutes a justification for not releasing the answer to question (a). Indeed, when the appellant pressed Group Captain Flewin on this point, the latter effectively agreed.

64. So far as concerns evidence of operations or “sorties” undertaken, there is, we find, a substantial difference between the information released, *ex post facto*, by the second respondent and what would be revealed by answering question (a). Drawing on an analogy from World War 2, it can be readily understood why, for reasons of boosting morale at home and seeking to undermine that of the enemy, the government would have been keen to release the news that, on a particular night, a specified number of Lancaster Bombers flew a mission over Berlin. It would, however, be entirely understandable why the government would be reluctant to reveal how many Lancaster Bombers it actually had at its disposal on that particular night. By the same context, question (a) is directed at the number of RAF Reaper UAVs that were available to the RAF on 1 March 2016.
65. We consider the evidence adduced by the second respondent discloses a significantly qualitative difference between the enemy (Taliban) faced in Afghanistan and the enemy (Daesh) currently faced in Iraq and Syria. The appellant did not, in our view, dispute that Daesh have an expertise in the cyber realm not possessed by the Taliban.
66. Two points flow from this. First, we accept the evidence that, as a result of their capabilities, Daesh pose a real risk of being able to make adverse use of the answer to question (a), by collating it with other evidence, so as to establish a picture of actual day-to-day RAF capabilities and activities regarding Reapers, which other foes might be unable to achieve.
67. Secondly, we accept Group Captain Flewin’s effectively unchallenged evidence that Daesh possess an online capability, that could be deployed to make propaganda use of the answer to question (a), quite apart from any military use.
68. Putting these two points together leads to the following matter. Disclosing the number of RAF Reaper drones “engaged in operations” on 1 March 2016 runs the real risk of enabling Daesh to realise which of the coalition forces were responsible for a particular strike. If, for example, the answer to question (a) was that there was one Reaper in operation but there had been two drone strikes on that date, almost at the same time but in very different locations, Daesh (and, for that matter, other third parties) could use this to identify the coalition member responsible for the other strike. This information could be used by Daesh for operational or propaganda purposes. In either case, there is a real risk of prejudice to section 26 interests.
69. Issue (iii) above was touched on by Group Captain Flewin in “open” but he was unable to say anything of substance in that part of the proceedings.
70. Regardless of that issue, however, we are satisfied for the reasons we have given that section 26(1)(b) is engaged in relation to question (a).

(3) Question (a): is section 27 engaged?

71. We are also satisfied that section 27(1)(a) is engaged in relation to question (a). The RAF's Reaper drones have been supplied to it by the US. In "open", Group Captain Flewin said that, not only as a result of this relationship regarding Reapers but also more generally with regard to UK/US military relations, the UK needed to avoid prejudicing those relations by releasing information by way of an answer to question (a), which its US allies would not wish to have released.
72. The appellant categorised any resulting prejudice as merely a "bump in the road". It was not, he said, sufficient to "trigger" section 27. We have more to say about this issue in our "closed" decision. Nevertheless, we can state here that we find the evidence given in "open" is sufficient to engage the section.
73. As the Information Tribunal held in Gilby v Information Commissioner and the Foreign and Commonwealth Office (EA/2007/0071):-
- "Prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary" (paragraph 23).
74. What makes the risk of prejudice "real and of substance" in the present circumstances is, we find, the fact that the UK and the US are engaged in an ongoing, significant, military campaign against an enemy that the United Kingdom government considers a significant threat to this country. Against this background, anything which runs the risk of creating discord between those military partners is enough to engage section 27. The fact that the consequences of the release of the information, against the US's wishes, might be ameliorated by UK diplomatic action and/or the intervention of UK defence personnel does not, on the facts of this case, render the prejudice immaterial. Whether it is sufficient to strike the public interest balance in favour of the second respondent is, however, another matter.

(4) Question (b): is section 26 engaged?

75. Section 26 is also relied upon by the second respondent in respect of question (b), along with section 27. So far as section 26 is concerned, irrespective of whether a particular base is publicly known, the combination of the answers to questions (a) and (b) would, as the appellant himself was at pains to emphasise, reveal whether on 1 March 2016 (or some other time period) some of the allocated Reapers were, in fact, in storage. Again, there is, in our view, plainly prejudice, in section 26 terms, in that Daesh and, for that matter, other foreign interests would gain insight into UK Reaper capabilities.

(5) Question (b): is section 27 engaged?

76. We next turn to the engagement of section 27 in relation to the appellant's question (b). The appellant's case here is that the information has, in effect, been released into the public domain as a result of the visit of the journalists to the Reaper base. In particular, the reference in the article which appeared in *The Sun* to "the Rock" makes it plain, the appellant says, that a particular base in Kuwait was visited by the journalists. Daesh are manifestly aware of this information, the appellant contends; so there cannot be any material prejudice in releasing it under FOIA.
77. There is nothing which the Tribunal can say about this matter in this "open" decision, save that, for the reasons given in our "closed" decision, we find that section 27 is engaged.

(5) Section 26: the public interest balancing exercise

78. We turn to the balancing exercise, to which we have earlier made reference. In doing so, we apply the relevant law, as set out above.
79. We examine first the public interest balance in respect of question (a). In his closing submissions on behalf of the first respondent, Mr Hopkins recalled what his client had said in her decision notice about the second respondent's position (with which she agreed):-

"It argued that disclosure of the information falling within the scope of the first and second limb of the request would be likely to assist opposing forces in building up a detailed picture of UK tactics and strike capabilities. The MOD explained that in light of such information enemy forces could then adjust their efforts, training, tactics and planning activities to exploit the likely use (and any perceived limitations) of UAV operations, including Reaper, for both the UK and other nations that use them and be able to develop better measures to counter them".

80. Mr Hopkins submitted that, in the light of all the evidence, this concern had not been undermined; rather, it had been strengthened.
81. The Tribunal agrees. The public interest in withholding the information involved in answering question (a) and – so far as section 26 is concerned – question (b) – is extremely powerful. This clearly emerges from our findings at paragraphs 59 to 69 above. In this case, the reasons why section 26 is engaged also present (individually and collectively) an enormously strong public interest in withholding the information. Group Captain Flewin has explained, in detail, how revealing the number of operational Reapers on 1 March 2016 would not only give Daesh access to information which would be at real risk of being exploited, both militarily and for propaganda purposes. There is currently a campaign being waged against Daesh. As an enemy, Daesh is, in significant ways, more formidable even than the Taliban. It is, of course, common knowledge that those asserting a connection with, or at least support for, Daesh have struck in the United Kingdom. The public interest in

revealing any information that risks assisting Daesh and prejudicing efforts to defeat it, is, we find, exceptionally strong.

82. We consider that the strength of the public interest is, in fact, demonstrated by the appellant's own submissions to us. One of his posited scenarios was that the answer to his questions might reveal that some of the UK's Reaper UAVs were, on 1 March 2016, in fact in "storage in the UK". The appellant said that this information would be of significant public interest, in that it would indicate that, for example, there were real workload pressures on RAF personnel. The appellant told us in this regard of concerns that the RAF has insufficient personnel to service and operate its Reapers.
83. One can immediately see how that scenario and, indeed, others deriving from the same information, could be exploited, not only by Daesh but by other foreign interests, to the great prejudice of UK interests.
84. The public interest in disclosure begins from the position that there is clearly an interest in openness and transparency regarding where and how the UK chooses to engage in military operations. We also accept that the appellant, particularly through his activities with Drone Wars UK, has highlighted issues of significant public concern regarding the use of UAVs. There is a respectable case for contending that the availability of such unmanned aircraft may lower the threshold at which a government chooses to pursue its interests militarily. Unmanned craft can be lost without risking the lives of pilots. They can also be flown operationally for longer periods than is the case with craft whose pilots are located within them.
85. Notwithstanding this, we find that the sheer strength of the public interest in non-disclosure of the requested information outweighs, by some measure, the public interest in disclosure.
86. We make that finding, notwithstanding the appellant's points concerning the need for Parliamentary oversight of the use of UAVs. To return to one of the appellant's scenarios, both Parliament and the public would have a strong interest in knowing whether shortages of relevant personnel were preventing the RAF from making full use of its UAV capabilities. Parliament, however, has its own means of exploring such issues with government. In any event, the public interest, in the present circumstances, is strongly against disclosure. To return to the World War 2 example, both Parliament and the British public would have had an interest in the issue of whether the government had sufficient Lancaster Bombers at its disposal; but it would obviously have been against the national interest to reveal that information to the Germans, during the war.
87. This brings us to a matter considered at the hearing. Both the appellant and the first respondent were concerned to learn Group Captain Flewin's assessment of when, if ever, the requested information might be able to be revealed without damage to relevant interests. Group Captain Flewin was, perhaps understandably, unable to be

specific. He did, however, consider that a period of one year would be far from satisfactory in this regard.

88. So far as our decision is concerned, the question is immaterial. At the relevant time, the information sought was, plainly, not of academic interest. The military campaign was (and is) ongoing. Nevertheless, we wish to place on record that we do not share the appellant's concerns that, if the information is not released now, then it can never be released. One can envisage a situation where the passage of time sees the disappearance of Daesh as a hostile force, together with changes in warfare practice and weaponry, which would make disclosure appropriate.
89. The first and second respondents submitted that the amount of information concerning RAF UAVs released by the second respondent reduced the public interest in the disclosure of the information requested in questions (a) and (b). Whilst it is true that, as we have seen, a considerable amount of information regarding RAF Reapers has been released into the public domain, we do not consider that this particular factor is of any material significance. We accept the appellant's case that he wishes to know the answers to his questions because, amongst other things, he and the public would be able to ascertain whether, for example, drones were not deployed in Iraq/Syria because of personnel shortages or because they were somewhere else entirely. There is, as we have held, a discrete public interest in knowing this; but that public interest is, for the reasons we have given, significantly outweighed by the public interest in withholding the information.

(6) Section 27: the public interest balancing exercise

90. So far as section 27 is concerned, it has been found by us to be engaged in respect of both questions (a) and (b).
91. Our reasons for finding that the balance in respect of section 27 lies in favour of not answering question (b) can, however, be given only in the "closed" decision. So far as question (a) is concerned, the position is less clear-cut. Whilst any avoidable diplomatic problem is plainly best avoided in the case of allies actively engaged against a common enemy, we are not satisfied that the risks involved would be sufficiently grave as to tip the balance in favour of not answering question (a) on section 27 grounds. This finding is reinforced by what we have to say on this topic in the "closed" decision. Our finding is, however, of no practical use to the appellant, given that we have found against him on section 26 grounds, as regards question (a).
92. The "closed" decision also includes further reasons why the public interest under section 26 lies in favour of withholding the requested information, as regards both question (a) and (b).

E. Decision

93. Both the “open” and “closed” decisions are unanimous.
94. This appeal is dismissed.

Judge Peter Lane

15 August 2017