

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 July 2024

**Public Authority:** Ministry of Defence

**Address:** Whitehall  
London  
SW1A 2HB

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the Ministry of Defence (MOD) seeking information a copy of a particular US memorandum of understanding and a copy of a particular NATO doctrine. The MOD provided some of the information falling within the scope of the request but sought to withhold the remainder on the basis of sections 27(1)(a) and 27(1)(b) (international relations).
2. The Commissioner's decision is that withheld information in question is exempt on the basis of each exemption and that for each exemption the public interest favours withholding the information.
3. The Commissioner does not require further steps.

#### Request and response

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4. The complainant submitted a request to the MOD on 20 July 2023 seeking the following information:  
  
"1. A PDF copy of the current edition of, 'US joint Staffs Joint Fire Support Executive Steering Committee Action Plan Memorandum of Agreement (US JFS ESC AP MOA (JTAC))'.

2. A PDF copy of the current edition of, 'AJP-3.3.2 (B)-Allied Joint Doctrine for Close Air Support and Air Interdiction'.
3. A dated list of all editions of 1 and 2 above including number of pages of each edition."
5. The MOD responded on 18 August 2023 and explained that it considered the information falling within part 1 of the request to be exempt from disclosure under section 27(1)(a) of FOIA and the information sought by part 2 to be exempt under section 27(1)(b) of FOIA. In relation to part 3, the MOD explained that it did not have a complete list of edition numbers, and that information regarding page numbers was exempt from disclosure on the basis of section 27(1)(a) or section 27(1)(b).
6. The complainant contacted the MOD on 24 August 2023 and asked it to conduct an internal review. He sought to challenge the application of all of these exemptions.
7. The MOD informed him of the outcome of the internal review on 28 March 2024. The MOD concluded that the document sought by part 1 of the request could be released as the MOD had received permission from the US for this to be disclosed. The only exception to this was in relation to the signatories' pages which were still considered to be exempt from disclosure on the basis of section 27(1)(a) and section 40(2). In relation to part 2 of the request the MOD explained that the current version of AJP-3.3.2 is (A); it explained that edition '(B)' is in development. The MOD explained that it had therefore assumed that the request was for the current version of the document and not the one that has not been agreed and issued.<sup>1</sup> The MOD explained that NATO had not consented to release of this document and therefore it remained of the view that this was exempt from disclosure on the basis of section 27(1)(b), and section 27(1)(a). In addition the MOD explained that it also considered section 27(2) to apply to this document. In relation to part 3 of the request, the MOD clarified its position and explained that it did hold requested information about editions and page numbers. The MOD provided this information in respect of the "US JFS ESC AP MOA" document but explained that the information it held in relation to "AJP-3.3.2 (B)-Allied Joint Doctrine for Close Air Support and Air Interdiction" was exempt on the basis of section 27(1)(b).

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<sup>1</sup> The MOD further explained that "The reference to it in a footnote to the forward of the current version of JSP 918 v4.1 (2020), was clearly in advance of its publication and was either a typo for '(A)' or that at the time of the JSP going to press, it was anticipated (wrongly) that '(B)' would be issued shortly".

## Scope of the case

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8. The complainant initially contacted the Commissioner on 24 February 2024 in order to complain about the MOD's handling of his request. Following the completion of the internal review he explained that he disputed the MOD's decision to withhold the signatories' page in relation to "US JFS ESC AP MOA" which fell within the scope part 1 of the request.
9. He also disputed the application of the exemptions to "AJP-3.3.2 (B)- Allied Joint Doctrine for Close Air Support and Air Interdiction", both to the document itself (part 2 of the request) and the decision to withhold details of previous editions and pages numbers of this document (part 3 of the request).
10. He was also dissatisfied with the length of time it took to complete the internal review.

## Reasons for decision

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### Parts 2 and 3 of the request

11. Section 27(1)(b) states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—...

...(b) relations between the United Kingdom and any international organisation or international court".

### The MOD's position

12. The MOD explained that the document in the scope of part 2 of the request was a classified NATO document and that the release into the public domain of NATO documents is strictly conducted by NATO authorities themselves. The MOD explained that NATO had not consented to the release of this document. As a result, the MOD argued that there is undoubtedly a risk of prejudice to the UK's relations with NATO should the MOD release the document. Such a disclosure, without NATO's consent, which would undermine principle of NATO confidentiality which depends on a relationship of mutual trust between member States. As a result the MOD argued that disclosure of the document in question would inevitably make relations between the UK and NATO more difficult and there would be a need to contain or limit damage which would not have otherwise been necessary if MOD had not

decided to place this information in the public domain. The MOD set the level of prejudice in relation to disclosure of the documents as "would" prejudice.

13. In support of this position, the MOD referenced the Information Tribunal in the case of Campaign Against the Arms Trade (CAAT) v The Information Commissioner and MOD (EA/2007/0040) para 81, which in relation to the application of section 27(1), the Tribunal stated that the prejudice can be real and of substance "if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary".
14. In relation to the information held by the MOD about versions of this document that fell within the scope of part 3 of the request, for similar reasons the MOD considered such information to be exempt from disclosure on the basis of section 27(1)(b), albeit that the level of prejudice was set at the lower level of 'would be likely to' prejudice.

#### The Commissioner's position

15. In order for a prejudice based exemption, such as section 27, to be engaged the Commissioner believes that three criteria must be met:
  - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
16. Furthermore, the Commissioner is also guided by the comments of the Information Tribunal cited by the MOD in its submissions above in determining whether prejudice in the context of section 27(1) can be said to be real and of substance.
17. With regard to the first criterion of the test set out above, the Commissioner accepts that the type of harm that the MOD believes would be likely to occur if the information was disclosed is applicable to the interests protected by section 27(1)(b).

18. With regard to the second and third criteria, the Commissioner accepts that effective international relations depend upon trust and confidence between partners. In this context the Commissioner notes that NATO has not consented to the disclosure of the requested document. Furthermore, the Commissioner notes the MOD's point that the release into the public domain of NATO documents is strictly conducted by NATO authorities themselves. In light of this the Commissioner accepts that disclosure of the document, without NATO's permission or authorisation, would be likely to impact on relations between the UK and NATO and furthermore that such an outcome would meet the description of prejudice described by the Tribunal in the CAAT case cited above. That is to say, disclosure would be likely to make relations more difficult and/or require a particular damage limitation exercise. The Commissioner is therefore satisfied that there is a real and significant risk of prejudice occurring and that such prejudice is clearly one of substance.
19. Given the difference between the information sought by part 2 of the request, ie the document itself, and the information sought by part 3, ie details of editions and page numbers of previous editions, the Commissioner agrees with the MOD's assessment as to the different levels of likelihood. That is to say the Commissioner accepts that taking the above factors into account disclosure of the document means that the risk of harm occurring is more probable than not, and whilst the risk of prejudice in relation to the other information is lower, there is still a real and significant risk of this occurring.
20. Section 27(1)(b) is therefore engaged.

### **Public interest test**

21. Section 27 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 27(1)(b) outweighs the public interest in disclosing the information.
22. The MOD acknowledged that there is a public interest in disclosing information which would demonstrate the MOD's commitment to openness and transparency. Release of information relating to NATO standardisation activities, developing military operational standards would also increase public confidence. For his part, the complainant simply argued that public interest favoured disclosure of the document.
23. With regard to the public interest in maintaining the exemption, the MOD emphasised that there was a public interest in respecting international confidences, and it was clearly against the public interest to undermine the UK's relations with NATO in this context. The MOD

argued that in its view there would need to be considerable arguments in favour of release of the information to justify the harm that would be caused to the UK's membership of NATO were it to release the information and to that extent the request to see the information in this case is not exceptional. The MOD therefore concluded that on balance the public interest is best served by the UK respecting NATO's expectation that the classified document would not be released.

24. The MOD noted that its position in this case was very similar to that taken by the Commissioner in decision notice IC-127873-S6Y7 which also concerned a document that required NATO's agreement to disclose.<sup>2</sup> The MOD noted that the Commissioner, whilst accepting that there was a clear public interest in the disclosure of the information requested, concluded that "in the Commissioner's view there is greater public interest in ensuring that the UK's relationship with the NATO, and its reputation within the alliance, are not undermined" (paragraph 26).
25. The Commissioner acknowledges that there is a public interest in the disclosure of information which would provide a greater insight into NATO's agreements with its member states, and in turn the UK's relations with NATO. Disclosure of the withheld document (and to a much lesser the details of previous documents sought by part 3 of the request) would contribute to towards this aim. However, as with his findings in the previous case highlighted by the MOD, the Commissioner considers there to be a significant public interest in ensuring that the UK's relationship with NATO, and its reputation within the alliance, are not undermined. Disclosure of the information withheld on the basis of section 27(1)(b), which NATO has not agreed to the disclosure of, would clearly have this prejudicial impact, and as with the previous case, the Commissioner finds that the public interest favours maintaining the exemption.
26. As the Commissioner has concluded that section 27(1)(b) provides a basis to withhold the information in the scope of part 2 of the request, and the information which the MOD holds falling within part 3, he has not gone on to consider whether such information is also exempt from disclosure on the basis of sections 27(1)(a) and 27(2) of FOIA.

### **Part 1 of the request**

27. As explained above although the MOD disclosed the document sought by part 1 of the request having received the US' consent to do so, it

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022718/ic-127873-s6y7.pdf>

withheld the details of the signatories to this document on the basis of section 27(1)(a) and section 40(2).

28. Section 27(1)(a) provides that:

“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”

### The complainant's position

29. The complainant disputed the MOD's position that disclosure of this information would harm the UK's relations with the US given that a previous version of this MOA dated "4 March 2021 Change 2 (16 February 2022)" is already in the public domain, complete with names and signatures. The complainant noted that the document in question could be accessed on an official Canadian government website and therefore should be considered to have been officially released.

### The MOD's position

30. In its internal review the MOD explained that although the US had consented to the disclosure of document itself, it had made a direct request to the UK not to release the US Signature Page and the Partner Nation Signature Pages in their entirety. In this context the MOD argued that release of this information would be harmful to the UK's ability to maintain good international relations with other states, primarily the US but also the other signatory nations, based upon mutual trust and confidence. The MOD set the level of prejudice in this case against release at the lower level of "would be likely to" rather than the higher "would".

31. In light of the document cited by the complainant, the MOD explained to the Commissioner that it did not know the conditions and/or circumstances under which the previous version of the document had been published by the Canadian Government and it could not be assumed by the MOD that consent was obtained from these signatories for further promulgation of their details in other contexts (ie a disclosure by the MOD under FOIA of a later version of the document). In addition, the MOD explained that in view of the document cited by the complainant it had sought clarification with the US regarding its position in respect of the signatory information sought by this request. In response the US confirmed that its position remained unchanged. In view of this the MOD explained that if it were to disregard the position of the US it would clearly cause damage to the UK's diplomatic relations

with the US, and indeed the relations with the other nations who signed the document, if the signatory information was released under FOIA.

### The Commissioner's position

32. With regard to the first criterion of the test set out above, the Commissioner accepts that the type of harm that the MOD believes would be likely to occur if the information was disclosed is applicable to the interests protected by section 27(1)(a).
33. With regard to the second and third criteria, as noted above in context of section 27(1)(b), the Commissioner accepts that effective international relations depend upon trust and confidence between partners. In this case the Commissioner accepts that disclosure of the signatory information, directly against the wishes of the US, would clearly be likely to impact on relations between the UK and US (and indeed potentially risks an impact on relations with the other nations who also signed the document). That is to say, disclosure would be likely to make relations more difficult and/or require a particular damage limitation exercise, especially in respect of the UK's relations with the US. The Commissioner is therefore satisfied that there is a real and significant risk of prejudice occurring and that such prejudice is clearly one of substance.

### **Public interest test**

34. The MOD argued that although release of the information would promote openness and transparency about the identities of those who signed the document and an amount of information about the signing protocol, in its view there was a greater public interest in the UK maintaining effective relations with other nations.
35. The Commissioner agrees with this assessment. Although disclosure would contribute to the openness in the way suggested, he notes that the remainder of the document has already been disclosed. In this context the Commissioner considers there to be a limited public interest in disclosure of signatory information when taking into the account the likely prejudice to the UK's relations with the US. The Commissioner is therefore satisfied that the public interest favours maintaining the exemption contained at section 27(1)(a).
36. In view of this decision the Commissioner has not considered the MOD's position that this information is also exempt from disclosure on the basis of section 40(2) of FOIA.



## Other matters

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37. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.<sup>3</sup> The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.<sup>4</sup>
38. In this case, as noted above, the MOD failed to meet these timescales as it took approximately seven months to complete the internal review, a review which was only completed subsequent to the complainant contacting the Commissioner about this request.

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<sup>3</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

<sup>4</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

## Right of appeal

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39. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

40. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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