

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 September 2014

Public Authority: The Ministry of Defence
Address: Main Building
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted four requests to the Ministry of Defence (MOD) about the Saudi Arabian National Guard Communications Project. ('SANGCOM'). The MOD provided some information but sought to withhold the remainder of the information on the basis of section 27 of FOIA. During the course of the Commissioner's investigation the MOD clarified the extent to which it held information falling within the scope of the disputed requests. It also sought to argue that the information it did hold attracted a number of further exemptions.
2. The Commissioner's decision is that:
 - The information falling within the scope of requests 2 and 4 is exempt from disclosure on the basis of section 27(1)(a) of FOIA and that in all the circumstances of the case the public interest favours maintaining the exemption.
 - The MOD breached sections 1(1)(a) and 10(1) by failing to confirm within 20 working days of the request whether it held information falling within the scope of requests 1 and 2.
 - The MOD also breached section 17(1) by failing to cite a number of exemptions, by the completion of the internal review, which it subsequently sought to rely on.

Request and response

3. The complainant submitted the following request to the MOD on 22 January 2014:

'Following recent correspondence with your press office I have been told that certain questions should be submitted in the form of a freedom of information request. Accordingly, please let me have information concerning -

- [1] the mechanism for approval by the MoD's SANGCOM team of a. payments or b. sub-contracting arrangements by prime contractor GPT Special Projects Management Ltd

- [2] occasions on which the inclusion of 'bought in services' in contract proposals and change proposals have been a. queried and b. to any extent rejected by the MoD's SANGCOM team

- [3] the identities of senior civil servants, ministers and consultancy firms involved in the negotiation and signature of the LOA3P3 phase of the project (signed in Feb 2010)

- [4] the nature of the letter of agreement signed by the ambassador to Saudi Arabia and SANGCOM in June 2013, referred to at the foreign affairs committee hearing by FCO minister Andrew Murrison on 18 June.¹

4. The MOD responded on 13 March 2014. It provided what it described as a 'general response' to requests 1 and 2; provided the information sought by request 3; and explained that the information within the scope of request 4 was exempt from disclosure on the basis of section 27(1) of FOIA.

5. The complainant contacted the MOD on 19 March 2014 in order to ask for an internal review of requests 1, 2 and 4. He asked that the review considered the following points:

'- on the mechanism for approval by SANGCOM, please explain the nature of "the agreed prices to be paid", as the response puts it.

¹ SANGCOM refers to the 'Saudi Arabian National Guard Communications Project' under which the UK government is responsible for placing contracts with prime contractors to improve the Saudi Arabian National Guard's communication network.

As payments are variable, what does the agreement cover? Does agreement on the prices include agreement that payments would be made for "bought in services", and in particular did it on LOA3P3?

- on the second bullet point, can you say, as required under the FoI Act, whether you hold this information, i.e. whether the inclusion of bought in services in change proposals and contract proposals has been queried and/or rejected?

- on the fourth bullet point, please explain the agreement with Saudi Arabia that makes this basic information secret and more fully outline the public interest considerations. Cases such as Gilby v ICO suggest openness in UK-Saudi relations (and I'm requesting only limited information) is far less damaging than your decision implies'

6. The MOD acknowledged receipt of this email on the same day and explained that in relation to request 1 it intended to process this as a new request for information albeit that it would 'informally review' the response given to requests 2 and 4.
7. The MOD informed the complainant of the outcome of its 'informal' internal review on 15 April 2014. It explained that on reflection it had decided to review request 1 rather than treat his correspondence of 19 March as a further request for information. In relation to requests 1 and 2, the internal review essentially reiterated the 'general response' previously provided. In relation to request 4, the MOD upheld the application of section 27.

Scope of the case

8. The complainant contacted the Commissioner on 17 April 2014 in order to complain about the MOD's handling of requests 1, 2 and 4. In particular, he has raised the following points of complaint:
 - The MOD only provided limited information in relation to request 1 (and it attempted to re-classify this as a new request rather than internally review its initial response);
 - The MOD failed to comply with the requirements of section 1(1)(a) of FOIA because it did not confirm or deny whether it held information falling within the scope of request 2. (By implication, the complainant was dissatisfied with the MOD's failure to provide any such information that may be held); and

- The MOD's reliance on section 27(1) of FOIA to withhold the information that falls within the scope of request 4. The complainant clarified with the Commissioner that he considered this request to cover not simply the actual letter of agreement (LOA) referred to in the request but also any further information concerning the letter itself (e.g. internal notes to ministers to explain the nature of the LOA).
9. During the course of the Commissioner's investigation the MOD contacted the complainant again on 6 August 2014 and confirmed that it did not hold information falling within the scope of request 1, albeit that it did hold information falling within the scope of request 2. However, the MOD explained to the complainant that it considered the information falling within the scope of requests 2 and 4 to be exempt from disclosure on the basis of the following sections of FOIA: sections 27(1)(a), 27(1)(c) and 27(1)(d) – international relations; 29(1)(a) – economy; 31(1)(a), 31(1)(b) and 31(1)(c) – law enforcement; 36(2)(b)(i) and 36(2)(c) – effective conduct of public affairs; 42(1) – legal professional privilege; 43(2) – commercial interests; and section 40(2) – personal data.
10. In light of this development the Commissioner has considered whether the information falling within the scope of requests 2 and 4 is exempt from disclosure on the basis of the exemptions cited by the MOD.

Reasons for decision

Section 27 – international relations

The MOD's position

11. The MOD has argued that all of the withheld information is exempt from disclosure on the basis of sections 27(1)(a) of FOIA, amongst other exemptions contained in section 27(1). Section 27(1)(a) provides that information is exempt if its disclosure would, or would be likely to, prejudice relations between the UK and any other State.
12. The MOD argued that disclosure of the information would – as opposed to simply being likely to – prejudice the UK's relations with the Kingdom of Saudi Arabia (KSA). The MOD provided the Commissioner with detailed submissions to support this position. The Commissioner has summarised these below albeit that he has not included the parts of the submissions that relate to the content of the withheld information itself.

13. The MOD explained that the UK has benefited from close diplomatic and commercial ties with the KSA since the nation's creation in 1932. This relationship is a key component of the UK's strategic relationship in the region. The UK's relationship with the KSA is underpinned by defence cooperation going back around 50 years, with the SANGCOM project having been in place for the last 36 years.
14. The MOD emphasised that the KSA's laws and culture do not share the same concept of information rights that most westernised countries regard as an integral part of the democratic process. Whilst the KSA will be aware of the existence of FOIA and to a certain extent the UK's legal obligations under it, given the different cultural perspective, the KSA is likely to be highly critical of any inability of the UK government to use its powers to protect what the KSA considers as important and strategic commercial interests in respect of the SANGCOM contract.
15. With regard to the information that has been withheld, the MOD noted that some of the information comprised frank advice to ministers from officials on the nature of the LOA. This advice was written on the assumption that it would not be released and consequently it is not couched in diplomatic language or written in terms that would avoid prejudicing international relations between the UK and the KSA.
16. Furthermore, the MOD emphasised that the constraints on the disclosure of information are expressly set out in the Memorandum of Understanding (MoU) between the UK and KAS governments. Under the MoU the UK is required to:

'Protect the confidentiality of any plans, specifications or information provided by, or obtained from, the Saudi Arabian Government and not communicate such material to anyone unconnected with this Memorandum of Understanding or Letter / Letters of Offer and Acceptance without the prior, written consent of the Saudi Arabian Government.'
17. Consequently, the MOD argued that disclosure of the LOA sought by this request or information related to it would clearly result in prejudice to the UK's relationship with the KSA. Moreover, in this context the MOD argued that disclosure of the remainder of the information falling within the scope of requests 2 and 4 would also harm the UK's relations with the KSA given that it concerned what the KSA considered to be its important and strategic commercial interests in respect of the SANGCOM contract.
18. The MOD emphasised that disclosure of the information would not only impact on the UK's relations with the KSA in respect of the SANGCOM contract but could also adversely influence future KSA foreign policy

more broadly and could hamper the development of closer ties with the UK. In a worst case scenario, disclosure of the information could result in the KSA deciding to reduce the current levels of diplomatic and military engagement.

The Commissioner's position

19. In order for a prejudice based exemption, such as section 27(1)(a), 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; and
- 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. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

20. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), 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*'.²

21. With regard to the first criterion of the three limb test described above, the Commissioner accepts that potential prejudice to the UK's relations

² [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

with the KSA clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect.

22. With regard to the second criterion, given the different cultural perspective between the UK and the KSA, and taking into account the broader context of the SANGCOM project, the Commissioner is satisfied that disclosure of this information clearly has the potential to harm the UK's relations with the KSA. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and the interests which section 27(1)(a) is designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the MOD believes would occur is one that can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular diplomatic response.
23. In relation to the third criterion, the Commissioner accepts that in the circumstances of this case the higher threshold of likelihood is met and he agrees with the MOD that disclosure of this information would prejudice the UK's relations with the KSA. Again the Commissioner has reached this conclusion in light of the different cultural perspective and expectations of the UK and the KSA regarding disclosure of information of this nature. Set against this background the Commissioner agrees that the disclosure of the information concerning the operation of the SANGCOM contract - both in terms of the operational information falling within the scope of request 2 and the more overarching information falling within the scope of request 4 - is more likely than not to prejudice relations between the UK and the KSA. In the Commissioner's view the likelihood of prejudice occurring is clearly increased given the specific expectations of confidentiality written into the MoU. He accepts that disclosure of the information would adversely affect the UK's relationship with the KSA more broadly, not only in relation to the SANGCOM contract.

Public interest test

24. Section 27 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosure of the information

25. The MOD acknowledged the following public interest arguments in favour of disclosure:
26. There is a general interest in releasing information which increases the public's understanding and knowledge of the UK's relationship with the KSA given the importance of that relationship to the UK's strategic interests in the region.
27. Disclosure of the withheld information could contribute to the public debate regarding the UK's diplomatic and international relationships and the importance of the contribution made by the UK's defence industry in supporting those relationships.
28. There has been public concern about the propriety and regularity of the commercial arrangements, including allegations of bribery and corruption, which have involved investigations by the Serious Fraud Office (SFO). There is a public interest in providing public assurance that the UK's arrangements with the KSA are handled in accordance with the highest moral, ethical and commercial standards and fully in accordance with both domestic and international law.

Public interest in favour of maintaining the exemption

29. The MOD argued that, given the significance of the UK's relationship with the KSA, it was firmly against the public interest to disclose information which would undermine that relationship. More specifically the MOD argued that it would be counter to the public interest to undermine the UK and Saudi defence and security relationship as this could impact on significant export prospects under the Saudi Armed Forces projects, and also other work involving British interests, including those relating directly to counter-terrorism cooperation.

Balance of the public interest

30. The Commissioner agrees that disclosing the withheld information which falls within the scope of request 4 would provide the public with a clear insight into the role of the UK in the SANGCOM project given that information sought by this request includes the LOA between the UK and the KSA covering the third phase of this project. Furthermore, disclosure

of the advice to ministers in relation to the LOA would be particularly useful in providing the public with an insight into the broader context of the LOA from the UK's perspective. Disclosure of the information falling within the scope of request 2 could also provide some insight into the scenarios described in that request.

31. The Commissioner considers that the public interest in disclosing this kind of information, in particular the information falling within the scope of request 4, should not be underestimated. Two factors are particularly relevant here: Firstly, given the significance of the UK and the KSA's relationship, there is a clear and legitimate public interest in disclosure of information which would provide the public with a greater insight into a major defence project such as SANGCOM. Secondly, there is a specific interest in disclosure of this information given the recent developments in relation to the SANGCOM project. In the Commissioner's view, the SFO's decision in August 2012 to launch an investigation into allegations concerning the SANGCOM prime contractor, GPT and aspects of their business in Saudi Arabia means that there is a particular public interest in disclosure of the withheld information in this case in order to clarify the role of the UK government in this matter.
32. However, the Commissioner accepts that there is a very significant and inherent public interest in ensuring that the UK can enjoy a strong and effective relationship with the KSA. This not only due to the importance of the UK's defence and security interests with the KSA, but also because of the strategic importance across the region of the UK's relationship with the KSA. In the circumstances of this case, the fact that disclosure of the information would prejudice these relations (rather than being likely to) adds further weight to the public interest in maintaining the exemption. Furthermore, the Commissioner recognises that disclosure of the withheld information at a time of heightened tensions in the Middle East region would be particularly damaging to the UK's interests in the region, including its defence operations.
33. Therefore, despite the weighty public interest in favour of disclosing the withheld information, the Commissioner's view is that the public interest in maintaining the exemption is greater in this case, given the broad prejudicial consequences of disclosing the information. The MOD was therefore justified in withholding the requested information.
34. In light of his findings in relation to section 27(1)(a), the Commissioner has not considered the MOD's reliance on the other exemptions.

Procedural breaches

35. Section 1 of FOIA states that:

'(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds the information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

36. Section 10(1) provides that:

'...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

37. In the circumstances of this case, the MOD did not clearly inform the complainant whether or not it held information falling within the scope of requests 1 and 2 until 6 August 2014. Therefore, by failing to comply with the duty contained at section 1(1)(a) in relation to these two requests within 20 working days, the MOD breached both section 1(1)(a) and section 10(1).

38. Furthermore, by citing exemptions in its letter to the complainant of 6 August 2014 that it had failed to specify in its initial response and internal review, the MOD also breached section 17(1) of FOIA.

Right of appeal

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: 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.

Signed

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF