

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 October 2017

**Public Authority:** Department for International Trade  
**Address:** King Charles Street  
Whitehall  
London  
SW1A 2AH

#### Decision (including any steps ordered)

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1. The complainant has requested information contained in an email which was sent to the Minister of State for Trade Policy, Greg Hands MP, from a US company and which formed the basis of a tweet sent by the Minister. The Department for International Trade refused the request, citing the exemption at section 43(2) (prejudice to commercial interests). Having investigated the Department for International Trade's application of section 43(2), the Commissioner has found that the Department for International Trade wrongly applied the exemption to the requested information. However, as the Department for International Trade voluntarily disclosed a copy of the email to the complainant during the Commissioner's investigation, the Commissioner requires no steps to be taken as a result of this decision notice.

#### Request and response

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2. On 28 August 2016, the complainant wrote to Department for International Trade (DIT) and requested information in the following terms:

*'The Minister of State for International Trade, Greg Hands MP, tweeted the following on 27<sup>th</sup> August 2016, at 11.29am:*

*'One US company emails, "The Minister was spot-on with his comments on Brexit & we've decided to stay based on guidance provided"*

*<https://twitter.com/greghands/status/769481879863042048>*

*I would like to request the following information about this statement:*

*1) The name of the company that Mr Hands was referring to,*

*2) All of the information contained in the email that Mr Hands received, including the metadata (my preference for the format for disclosure of this information is a full copy of the email in question).*

*Please be clear in confirming or denying that the information is held'.*

3. DIT responded on 21 September 2016. They confirmed that they held the requested information but that it was exempt from disclosure under section 43 of the FOIA. The response failed to specify the sub-section which DIT were relying on or provide an explanation for the exemption. With regard to the public interest test DIT stated that:

*'We appreciate that there is a public interest in understanding the nature of the work of Government and how it interacts with business. However, in this case it is also important that Government protects commercially sensitive information to allow this particular business to continue to operate in anonymity to limit the exposure of its business strategy; the disclosure of which may be advantageous to competitors operating in the same sector'.*

4. The complainant requested an internal review of the decision on 8 October 2016. He contended that section 43 could not apply to the metadata requested (i.e. date and time the email was received, who it was received by, subject line etc) as *'none of these would reveal the identity of the company, and so I do not believe that s43 could possibly apply'*. The complainant also contended that the public interest had not been properly assessed. He stated that:

*'Mr Hands used this company to further government policy – his tweet was intended to show how companies would not be deterred from investing in the UK following the vote to exit from the EU. If he chose to do this, then the public interest requires that people are able to assess what kind of company it is – which sector, employing how many people, investing how much in the UK economy. Mr Hands chose to open the door to these questions by putting this information into the public domain. If Mr Hands thought that disclosing the identity of the company would damage their commercial interests, he should not have made any reference to them. The nature of the company and its likely contribution to the UK's future prosperity are a matter of significant public interest'.*

5. DIT provided the complainant with the internal review on 28 October 2016. The review upheld the original decision and stated that *'the meeting between the Minister and the company was a private one with*

*the company making no public statement on its future investment plans'. The review reiterated that the company 'should be allowed to continue to operate in anonymity to limit the exposure of its business strategy to the possible advantage of its competitors'.*

## Scope of the case

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6. The complainant contacted the Commissioner on 1 December 2016 to complain about the way his request for information had been handled.
7. In submissions to the Commissioner, DIT advised that they had withheld the requested information because at the time of the complainant's request the UK investment relevant to the company was not complete (and remained incomplete at the time of the Commissioner's investigation). DIT had believed that disclosure of details of the company concerned would have revealed the company's strategy and prejudiced its commercial interests. Whilst DIT recognised the public interest in disclosure of information regarding overseas company decisions to invest (or maintain investments) in the UK at this time, they believed that disclosure of information which would be likely to prejudice the company's commercial interests and possibly lead to a withdrawal of such investment, would not be in the public interest.
8. However, as a result of the Commissioner's investigation DIT advised that they had taken steps to contact the company concerned. Upon explanation of the situation the company had agreed for the email and their name<sup>1</sup> to be disclosed. DIT therefore provided the complainant with a copy of the email with appropriate section 40(2) (third party personal data) redactions for the name and contact details of the company representative and the junior member of DIT staff at the British Consulate who had the exchange.
9. In view of DIT's decision to voluntarily provide the complainant with the previously withheld information the Commissioner contacted the complainant and proposed to proportionately and informally close his complaint with a reminder to DIT that where appropriate (as in this case), third party representations/views should be obtained at the time of responding to an information request rather than only after a

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<sup>1</sup> PACSHealth

complaint has been made to the ICO. The Commissioner is of the view that to issue academic decision notices where information is already released is to be avoided, as it provides little additional value and diverts resources from our consideration of other cases.

10. The complainant objected to the Commissioner's proposed course of action, and asked, *'How can other organisations learn the right way to handle FOIs if the ICO will not make and publish decisions?'* The Commissioner advised the complainant that she will, wherever possible, and subject to the cooperation of the parties, always aim to secure a proportionate informal resolution to a complaint where appropriate. The Commissioner notes that her published guidance for public authorities is clear as to how they should apply FOIA exemptions. FOIA is about the exercise of the appropriate right of access to information held by public authorities and the Commissioner's priority is to ensure that information which ought to be disclosed by a public authority to a requester is disclosed, and as quickly as possible. Where a public authority refuses to engage with the Commissioner or maintains a position contrary to the Commissioner's advice then the matter could only be resolved by way of a decision notice.
11. However, in this case DIT fully cooperated with the Commissioner's investigation and voluntarily chose to disclose the previously withheld information. As noted above, the Commissioner explained to the complainant that she would be reiterating to DIT the need to seek third party representations/views where appropriate and necessary in section 43(2) cases.
12. Whilst the Commissioner has agreed to issue a decision notice on this occasion, she notes that she considers it appropriate for complaints to her to be resolved informally where possible; such an approach is in keeping with the principles of good regulation and allows for a proper and proportionate focus of resources on those information rights cases which demand it. She therefore strongly encourages a degree of cooperation and, where relevant, compromise, on the part of all parties to a complaint made to her.
13. The scope of the Commissioner's investigation has been to determine whether DIT were correct to withhold the information (subsequently provided to the complainant) under section 43(2) at the time of the request.

## Reasons for decision

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14. Section 43(2) of the FOIA states that information is exempt information if its disclosure under the legislation would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). A commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services.
15. In order for a prejudice based exemption such as section 43(2) to be engaged the Commissioner considers 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 – ie 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 to discharge.
16. In the internal review DIT advised that the company involved in the email exchange needed to operate in anonymity to limit the exposure of its business strategy to the possible advantage of its competitors. In submissions to the Commissioner DIT explained that at the time of the request they had believed that disclosure of details of the company would reveal the company's strategy and prejudice its commercial interests.
17. Having had sight of the (now disclosed) email, the Commissioner would note that the information contained in the email as sent by the company concerned is extremely brief. The company advised that they had decided to stay in the UK *'based on the guidance provided'*. In disclosing the company's decision to stay in the UK the email could be said to provide some information as to the company's investment intentions, but it was not the type of detailed or sensitive information which would expose the company's business strategy and potentially

advantage a competitor(s). The email did not detail exactly what guidance had been provided by DIT which had led the company to take its decision.

18. The Commissioner's published guidance on section 43(2) makes clear that when a public authority wants to withhold information on the basis that to disclose the information would or would be likely to prejudice the commercial interests of a third party, it must have evidence that this does in fact represent the concerns of that third party. It is not sufficient for the public authority to speculate on the prejudice which may be caused to the third party by the disclosure.
19. The Commissioner's guidance states that, *'if it is established that a third party does not itself have any arguments or concerns about prejudice to its commercial interests, then the public authority should not present speculative arguments on behalf of that third party'*. In this case DIT failed to contact the company to inform it of the information request and to ascertain whether the company had any concerns that the disclosure of the information would, or would be likely to prejudice the company's commercial interests. If DIT had contacted the company at the time of the request, in accordance with the correct approach in such cases, then DIT would have received confirmation (as they later did) that the company had no objection to the disclosure of the email and its identity.
20. The Commissioner would note that given the brief nature of the information contained in the email, as discussed in paragraph 16 above, it is difficult to see how the company could have otherwise advanced a credible case that disclosure of the email would have prejudiced its commercial interests.
21. The Commissioner does not consider that the requested information in this case was capable of prejudicing the commercial interests of the company concerned and has found that in responding to the request DIT wrongly advanced speculative arguments on behalf of the company which had no basis in fact. Consequently, the Commissioner is satisfied that section 43(2) was not engaged in respect of the complainant's request.
22. Having found that the exemption was not engaged in this case, the Commissioner is not required to consider the public interest test. As DIT provided the complainant with a copy of the previously withheld information during the course of the Commissioner's investigation the Commissioner does not require DIT to take any further action in respect of this matter.

## Right of appeal

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23. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

24. 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.
25. 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** .....

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**