

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 May 2023

Public Authority: Department for Business and Trade
Address: Old Admiralty Building
Admiralty Place
London
SW1A 2DY

Decision (including any steps ordered)

1. The complainant requested from the Department of Business and Trade ('the DBT'), information relating to an approved arms licence. The DBT refused the request on the basis that the exemptions in sections 41, 40(2), 43 and 36(2)(b)(i)&(ii) of FOIA applied.
2. The Commissioner's decision is that the DBT was correct to apply the exemptions in section 41(1) and 36(2)(b)(i)&(ii), and that the public interest rests in the information being withheld.
3. The Commissioner does not require the DBT to take any steps.

Request and response

4. On 26 August 2022, the complainant wrote to the Department for International Trade (the 'DIT') and requested information in the following terms:

"(1) According to a DIT freedom of information response (FOI2021/04958) dated 3 September 2021, it is disclosed that on 11 November 2020 a Standard Individual Export Licence (SIEL) was issued by DIT to EDO MBM Technology Ltd, Home Farm Road, Brighton, for the export to Abu Dhabi, United Arab Emirates, of items rated under the UK Military List as,

"ML22a, and ML4b1". Published UK government data discloses just one licence approved for this date for the proposed export to Abu Dhabi for

"launching/handling/control equipment for munitions. ML4. Â£45,000,000.,"

"components for military training aircraft ML10 Â£21,949.," and "technology for launching/handling/control equipment for munitions ML22. Â£2,100,000".

(2) Please provide the following information related to licence in (1) above.

(2.a) Current status of licence (i.e. Extant, Expired, Exhausted, Revoked, etc)

(3.) Records of any kind containing description of equipment, components and technology approved for export in (1) above.

(4.) Records of any kind describing ultimate end-use, end-user, military platform or equipment, for which the equipment, components, and technology in (1) above will be used".

5. The DIT responded on 27 September 2022. It disclosed information, however it withheld information in relation to parts 3 and 4 of the request on the basis that the exemptions in sections 41 and 43 of the Act apply (information provided in confidence and commercial interests).
6. Following an internal review DTI wrote to the complainant on 17 February 2023. It maintained the application of sections 41 and 43, but also applied section 36(2)(b)(i) and (ii) to withhold the information (prejudice to the effective conduct of public affairs).

Scope of the case

7. Although the request was made to the DIT, on 7 February 2023 it was announced that the Department for International Trade (DIT) is now the Department for Business and Trade (DBT). The Commissioner will therefore refer to the authority as such in this decision notice.
8. The complainant contacted the Commissioner on 2 February 2023 to complain about the way their request for information had been handled. Initially this was to complain that no internal review response had been received. However, on 17 February 2023, having received the review response, the complainant updated their complaint. They argued that the DBT was not correct to apply the exemptions that it had, and that the public interest in the disclosure of the information outweighed the application of the exemptions even if they were engaged correctly.
9. During the course of the Commissioner's investigation the DBT also applied section 40(2) (personal data of third parties) to withhold information.
10. The Commissioner therefore considers that the scope of his investigation is to decide whether the DBT was correct to withhold the information under sections 36(2)(b)(i)&(ii), 40(2), 41(1), and 43(2) as regards parts 3 and 4 of the request for information.

Reasons for decision

Section 36 – Prejudice to the effect conduct of public affairs

11. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
12. The DBT applied sections 36(2)(b)(i) and (ii) to withhold information which relates to its deliberations, and where advice was sought and received, internally and from other departments. Although the request did not specifically ask for internal deliberations, or information on the decision making process etc, the information requested included "Records of any kind containing...", which would include such information within its scope.
13. Arguments under these sections are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.

14. The Commissioner's guidance on section 36¹ states that information may be exempt under sections 36(2)(b)(i) and (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation.
15. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The DBT clarified that the advice of a minister was sought and that he provided his opinion in respect of section 36(2)(b)(i) and (ii) on 14 February 2022. The Commissioner is therefore satisfied that a qualified person under section 36(5) of FOIA gave the opinion that the exemption was engaged.
16. In this case, the qualified person argued that DBT staff must be able to provide and receive full and frank advice and deliberate licence applications appropriately when seeking the advice of ministers over matters of importance such as arms licences. They are concerned that if the information were to be made public their ability to provide and receive information in a full and frank way would be curtailed in the future due to the risk of sensitive information subsequently being disclosed in response to information access requests.
17. The Commissioner accepts this argument. The issues involved in the discussions are sensitive, and would be likely to be just as sensitive in other similar deals. There is a strong onus on the need for decision makers to receive full transparency on the circumstances surrounding licence applications in order that the final decision makers are fully informed about the issues involved. Any hesitance amongst officials to include sensitive information within the information used to decide the application would be likely to make decision-making less informed, and therefore less effective. Given the potential risks involved in deals of this nature, the repercussions of a wrong decision in this field could be significant.
18. The Commissioner therefore accepts that the qualified persons opinion was reasonable; that there was a need to protect the confidentiality of discussions and deliberations regarding the licence application. The Commissioner is therefore satisfied that the exemption was engaged correctly.

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

The public interest test

19. Section 36 of the FOIA is a qualified exemption and is subject to the public interest test. The Commissioner must consider whether, in all of the circumstances of the case, the public interest in the exemption being maintained outweighs that in the information being disclosed. If it does not, then the information should be disclosed despite the exemption being correctly engaged.

The public interest in the information being disclosed

20. For its part, the DBT recognised that the administration of the UK's system of export controls and licensing for military and dual-use items is a matter of public interest. It considered that the disclosure of the requested information would provide transparency around the subject of export controls and licensing and allow the public to draw a more detailed picture as to how the service is delivered.
21. The complainants argument is that the DBT's decision did not take into account the wider public interest in disclosure, and that, in this case, the issues favouring disclosure are far more serious than simple transparency of UK arms export control.
22. The complainant argued that the withheld information directly engages UK obligations under international law not to assist serious violations of international humanitarian law, war crimes, and crimes against humanity, and that there is a clear risk that this specific export licence will assist the commission of serious violations of international law. They highlighted an article from the Guardian newspaper, dated 2018, which reported that parts stamped with the company's name were found at the site of a bombing in Yemen which was considered to be a breach of international humanitarian law².
23. The complainant argues that at the time this licence was granted, there was a clear risk that the equipment would be used to commit serious violations of international law, and that the government was aware of this. They argue, therefore, that according to UK domestic law, the licence should not have been granted.
24. The complainant therefore argued that this licence application and its related documents should be made public in order to bring to light how such events occurred and who authorised them.

² <https://www.theguardian.com/world/2019/aug/18/un-experts-discover-british-made-bomb-parts-in-yemen>

The public interest in the exemption being maintained

25. The DBT highlighted that there is a strong public interest in protecting the ability of DBT staff to seek and receive advice, and to deliberate in a full and frank way, important issues such as the granting of licences to trade in controlled goods internationally.
26. The DBT highlighted that good government requires a freedom to seek and obtain advice, and deliberate issues such as the approval of licences of military and dual use goods on a full and frank basis. It argued that any chilling effect which would occur as a result of the disclosure of the withheld information would be detrimental to its decision making abilities, and would, overall, prejudice its ability to reach decisions on a fully informed basis.
27. It further argued that when briefing Ministers, it is important that officials can feel confident to provide frank details on where the sensitivities around an issue might lie without concerns that such advice may subsequently be disclosed.
28. DBT also argued that a disclosure of the information would be likely to affect its internal deliberations as third parties submitting licence applications may be less forthcoming with information if they believe that that information may subsequently be disclosed. It argued, therefore, that a key driver in securing engagement is reassurance that the information which is provided to it will not subsequently be disclosed inappropriately.

Conclusion of the public interest test.

29. The Commissioner has had sight of the withheld information.
30. The Commissioner has no power to decide whether controlled goods licences have been granted in line with national or international laws. These powers rest with the appropriate decision makers, and ultimately with parliament or with the relevant courts. Although the complainant argues that the licence in question should not have been granted due to the surrounding circumstances, the Commissioner has no powers to decide whether that argument is correct or not. As he is unable to do this, he cannot therefore take the complainant's associated arguments into account in his decision on the application of the exemptions in this case. The licence was approved via the legal process which the UK Government has in place for the export of such goods, and as such, the Commissioner must accept that the licence was appropriately considered and decided upon.
31. The Commissioner must therefore consider the application of the exceptions and the public interest in maintaining the exemption against the disclosure of the withheld information on the basis that the licence

was approved appropriately, via the proper and prescribed processes. The question for the Commissioner is therefore whether the public interest in disclosing information on an authorised licence is outweighed by the public interest in the exemption being maintained.

32. The Commissioner accepts that Department Ministers and officials need a 'safe space' in which to deliberate, and to provide free and frank advice in regards to requests made under FOIA. The information which is relied upon, and the deliberations which take place over such licence applications may involve sensitive and commercially sensitive information, which would all need to be considered in detail prior to a licence being awarded. Any risks associated with a subsequent disclosure of that information may impinge upon the DBT's ability to provide full and frank advice and to deliberate issues with the required tenacity, leading to a less informed and less robust decision being reached. The risks associated with incorrect decisions being taken under such circumstances will obviously be greater if the analysis of the applications cannot occur on a full and frank basis.
33. The Commissioner therefore considers the public interest in protecting good decision-making by the DBT takes precedence over the public interest in the information being disclosed in this instance. The Commissioner acknowledges the public interest in openness about issues such as licences for the international sale of military and dual use equipment is very strong. However, on balance, there is a stronger public interest in protecting the DBT's ability to be able to analyse, seek advice, and deliberate on all aspects of such licence applications on a full and frank basis. It is only in this way that the licences can be appropriately considered and a fully informed decision reached. The Commissioner considers that this ability is of greater public importance in this instance.
34. Consequently, he is satisfied that the public interest favoured maintaining the exemption and the DBT was entitled to rely on section 36(2)(b)(i) and (ii) of FOIA to withhold the information requested at in parts 3 and 4 of the request.

Section 41(1) – Information provided in confidence

35. The DBT applied section 41(1) to information which was provided by the company as part of the licence application process.
36. Under section 41(1) of FOIA, a public authority is entitled to withhold information if:
 - (a) the information was obtained from another person, and;

(b) disclosure would constitute a breach of confidence.

Was the information obtained from another person?

37. The withheld information relates to an application for a licence to export restricted goods from the UK. The information was provided to the DBT by the applicant as part of the licencing process. The Commissioner is therefore satisfied that it is information obtained from another person.

Would disclosure constitute a breach of confidence?

38. When determining whether disclosure constitutes an actionable breach of confidence, the Commissioner will consider the following tests:
- Does the information have the necessary quality of confidence?
 - Was the withheld information imparted in circumstances importing an obligation of confidence?
 - Would unauthorised disclosure cause detriment to the party providing the information or to another party?
 - Is there a public interest defence?

Does the information have the necessary quality of confidence?

39. The withheld information relates to a commercially sensitive licence application to export military and dual-use items to another country. The information which has been withheld is not otherwise in the public domain, and relates to a sensitive issue surrounding the sale of equipment which can be used in a military capacity.
40. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

41. The DBT highlighted that the information was imparted to it under circumstances which gave rise to a duty of confidence. It argues that, given the commercial sensitivity of the information, there was an implied obligation of confidence when the information was provided to the Department.
42. Additionally, it noted that the company had explicitly indicated on the licence application form under the FOIA declaration, that the 'information on the application form was provided under a duty of confidence and was subject to a Non-Disclosure Undertaking. As such, public disclosure would result in an actionable breach of confidence'. It said that the company has since confirmed to it that there is a valid

Non-Disclosure Agreement (NDA) between it and its customer, the End User. The terms of the NDA make it clear that the information is provided in strict confidence.

43. The Commissioner is therefore satisfied that the information was provided to the DBT under an obligation of confidence.

Would unauthorised disclosure cause detriment to the party providing the information or to another party?

44. The DBT highlighted that the withheld information contains sensitive information about proposed exports (including sensitive information about the applicant, the type of goods they are trading in, types of licence applied for, the result and status of each application, details of consignees, end-users and other third parties, and the value of the exports). It argued that this information is commercially sensitive and that it could be of use to the company's competitors. It argued that a disclosure of this information, linked to a named UK company, would reveal specific sensitive information, derived from confidential contracts, that would be likely to damage the trading relationship between the company and its customers. It argued that this would be likely to risk a loss of any current contracts in place and would be likely to risk future trading opportunities with those customers.
45. Having considered the DBT's arguments, the Commissioner is satisfied that if the information were to be disclosed there would be a commercial detriment to the company.

Would there be a public interest defence to the disclosure of the information?

46. The complainant argues that due to the previous findings (as reported in the guardian article referenced above), there would be a public interest defence to the disclosure of the information in this case.
47. As noted above, however, the Commissioner cannot make a judgement on the legality of the licence approval as it does not fall within his powers to do so. His decision must be based on the fact that a legally approved licence was in place, and taking this into account, he must decide whether there would be a public interest defence to the disclosure of the information.

48. The DBT noted that there is a public interest in informed debate regarding the licensing and export of controlled goods. It further noted that a disclosure would offer greater insight and understanding of its role in UK's regulatory framework for export controls and in promoting economic opportunities and growth for UK businesses and for the British public.
49. The Commissioner notes that there is a strong public interest in creating transparency over the role of the government in approving the sale of military and dual use equipment overseas, particularly where there has been previous issues with the use of similar equipment exported to the same region. There is also a general public interest in the disclosure of information relating to the sale of military goods. Greater transparency over the sale would highlight to the public that appropriate steps were taken by all parties in order to ensure that national and international laws were complied with.
50. However, this needs to be balanced against the implied public interest within the duty of confidence which was in place, and against the public interest in allowing the lawful sale of goods and services, properly approved via the necessary licencing procedures, without undue prejudice to the interests of the company concerned.
51. The information was submitted to the DBT for the sole purpose of obtaining the licence to permit the export of the goods concerned. The company carried out the steps necessary in order to be able to legally export the goods under UK law. It had no option but to submit the information to the DBT if it wished to obtain the licence in order to trade within UK laws, and the DBT, after carrying out suitable checks, decided that it was appropriate for that licence to be issued. A subsequent disclosure of the information would be damaging to the company, as described above, and if this occurred, there would be an actional breach of confidence by the DBT under these circumstances.
52. The weight of the public interest, under these circumstances, rests in protecting the ability of the company to be able to interact with DBT on a full and frank basis in order that the DBT is fully informed of the deal to be licenced, and in order that the company is able to obtain its licence to trade without unduly prejudicing its commercial interests.
53. Given this, the Commissioner considers that there would no public interest defence to a subsequent disclosure of the information in this case.
54. The Commissioner's decision is therefore that the DBT was correct to apply section 41(1) to withhold the information from disclosure.

Sections 43 and 40(2)

55. As the Commissioner has found that the DBT was correct to apply section 36(2)(i) and (ii), and section 41(1) to the withheld information, he has not found it necessary to consider the application of sections 43(2) and 40(2) by the DBT further within this decision notice.

Right of appeal

56. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

57. 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.

58. 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

Ian Walley
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