

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 August 2023

Public Authority: Department for Business and Trade¹
Address: Old Admiralty Building
Admiralty Place
London
SW1A 2DY

Decision (including any steps ordered)

1. The complainant requested communications between the Department for Business, Energy & Industrial Strategy (BEIS) and the Scottish Government regarding the sale of Dalzell and Clydebridge Steel Plants in 2016. BEIS confirmed that it held information falling within the scope of the request but considered it to be exempt from disclosure on the basis of sections 27(1)(b) (international relations), 28(1) (relations within the UK), 42(1) (legal professional privilege) and 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of sections 27(1)(b), 28(1) and 43(2).

¹ The complainant's request was submitted to the Department for Business, Energy & Industrial Strategy (BEIS). However, as a result of machinery of government changes in February 2023 this department no longer exists and responsibility for the policy area to which this request relates was transferred to the Department for Business and Trade (DBT). The decision notice is therefore served on DBT.

Request and response

3. The complainant submitted the following request to BEIS on 18 October 2022:

'In accordance with Freedom of Information legislation, I would be grateful if you could comply with the following request.

1. Please confirm if there were ever any discussion between your department and the Scottish Government in 2016 in regards to whether a deal it was considering, in which the Scottish Government would buy the Dalzell and Clydebridge Steel Plants from TATA Steel before immediately selling them onto Liberty Steel would constitute State Aid. This deal was finalised on the 24th March 2016.

2. If the answer to 1 is yes, please provide a copy of all correspondence, phone calls, handwritten notes or other such documentation about this matter.'

4. BEIS responded to the request on 3 November 2022 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of sections 27(1)(b), 28(1) and 43(2) of FOIA.
5. The complainant contacted BEIS on 10 November 2022 and asked it to conduct an internal review of this response.
6. BEIS informed her of the outcome of the internal review on 30 November 2022; this upheld the application of all of the exemptions.

Scope of the case

7. The complainant contacted the Commissioner on 16 February 2023 in order to complain about BEIS' decision to withhold the requested information. During the course of the Commissioner's investigation, further information falling within the scope of the request was identified and DBT confirmed that it considered such information to be exempt from disclosure on the basis of sections 28(1) and 42(1) (legal professional privilege) of FOIA.
8. This decision notice therefore considers whether the withheld information falling within the scope of the request is exempt from disclosure under FOIA based on the exemptions cited by BEIS and DBT.

9. It should be noted the Commissioner's role is limited to considering the application of any exemptions (including the balance of the public interest test) at the point at which the request was submitted.

Reasons for decision

Section 27(1)(b) – international relations

10. DBT withheld some information on the basis of section 27(1)(b) which states that information is exempt if its disclosure would, or would be likely to, prejudice 'relations between the United Kingdom and any international organisation or international court'.

DBT's position

11. DBIT explained that the information withheld on the basis of this exemption describes communications between the UK government and European Commission (the Commission) regarding the transaction which is the focus of this complaint. DBT explained that any such communications with the Commission were on the basis that the exchange of information would remain confidential.
12. In particular, DBT explained that the correspondence describes processes of the Commission including those in place following the Withdrawal Agreement, and refers to an informal investigation it had conducted which was not in the public domain. DBT further explained that correspondence between the Commission and a Member State on an allegation of unlawful aid is not made public unless and until the Commission decides to move to the formal, public stage of the investigation. The informal part of a Commission investigation is a confidential process between the Commission and the Member State. DBT argued that the Commission must be able to conduct its preliminary inquiries in confidence with the Member State as there needs to be a full exchange of often commercially sensitive information and views before it can reach a decision. DBT explained that as the Commission decided not to pursue the matter in this particular case, the information that would not normally be released.
13. In light of the above, DBT argued that releasing this information would be harmful to the UK's relationship with the Commission as this would go against normal practice and would reveal details about handling of cases which it, ie the Commission, had every reason to believe would remain confidential. DBT argued that it remains important that the Commission has trust in the way the UK government handles information as it still needs to exchange policy and commercial details with them as part of the UK's obligations under the Trade and Co-

operation Agreement and the Windsor Framework. If this were put in doubt in any way, it could hinder the smooth operation of these regimes. It could also hamper the UK's efforts to rebuild trust and a more normal relationship with the Commission.

The Commissioner's position

14. 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 – 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 laces a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

15. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by DBT relates to the interests which the exemption contained at section 27(1)(b) is designed to protect.

16. With regard to the second and third criteria, in the Commissioner's view it is plausible to argue that disclosure of information under FOIA which describes confidential communications between the UK and Commission is clearly likely to have an impact on the UK's relations with the Commission. More specifically, the Commissioner accepts that such a disclosure would be likely to have a direct impact on the trust the Commission has in the UK, particularly as the information relates to an informal investigatory process, details of which would not usually be disclosed. The Commissioner also accepts that this loss of trust and confidence could impact on the UK's relations with the Commission in the post Brexit working environment as described by DBT. On this basis

the Commissioner has therefore concluded that the second and third criteria are met.

17. In reaching the conclusion that section 27(1)(b) is engaged the Commissioner has taken into account the fact that – as discussed below – the Scottish Government provided the complainant with some information in response to a similar request submitted to it. However, the Commissioner notes that the complainant's request (and subsequent related disclosure) was made after her request to BEIS was submitted.² As noted above, the Commissioner's role is limited to considering the circumstances at the point that the request was submitted, ie before any disclosure by the Scottish Government. In any event, the Commissioner has considered the disclosures of information provided to the complainant by the Scottish Government. None of these disclosures contain information withheld by DBT in response to her request to it. The only exception is one document which BEIS withheld³; a heavily redacted version of this was disclosed by the Scottish Government. BEIS relied on sections 27(1)(b), 28(1) and 43(2) of FOIA to withhold that document.

Public interest test

18. Section 27 is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest arguments in favour of disclosing the information

19. The complainant emphasised that she had submitted her request to establish what discussions the UK Government had with the Scottish Government in 2016 about whether a deal the Scottish Government was considering would have breached state aid rules. As noted by the request the deal in question consisted of the Scottish Government buying Dalzell and Clydebridge Steelworks from Tata Steel before almost immediately selling it onto Liberty Steel. This deal was finalised in March 2016. The complainant argued that there was a significant public interest in knowing what happened in 2016, including whether the Scottish Government ignored advice regarding the implications for state aid rules or whether the UK Government provided incorrect advice. The

² The request to the Scottish Government was made on 16 September 2022 and its disclosure of information was made on 7 December 2022.

³ A letter from the Scottish government dated 15 December 2021.

complainant argued that given the impact on Scottish taxpayers, should it be decreed that no state aid is involved in the deal, and Liberty Steel collapses as it may do it, is in the public interest to know what happened and how it has impacted them.

20. The complainant explained that the Scottish Government had provided her with redacted copies of emails between it and UK Government officials. As a result the complainant argued that there is partial information within the public domain and to not provide fuller information only leads to further speculation which is unnecessary and provides confusion rather than answers. Thus, the complainant argued that it would serve the public better to see the information from the UK Government rather than speculate on redactions.

Public interest arguments in favour of maintaining the exemption

21. DBT argued that it is the public interest that the UK is able to maintain effective relations with the Commission as it still needs to exchange policy and commercial details with them as part of the UK's obligations under the Trade and Co-Operation Agreement and Windsor Framework. DBT argued that it would not therefore be in the public interest for the UK's relations with the Commission to be undermined.

Balance of the public interest arguments

22. The Commissioner appreciates that there are ongoing questions about the 2016 deal which is the focus of the request, including whether the Scottish Government complied with state aid rules. The Commissioner also acknowledges, as the complainant's submissions have suggested, that some questions remain as to whether the deal has resulted in longer term liabilities for the Scottish Government.⁴ In view of this the Commissioner agrees that there is a considerable public interest in the disclosure of information which would aid transparency around the deal and furthermore he is satisfied that disclosure of the information withheld on the basis of this exemption would contribute directly to that.
23. However, in relation to the public interest in maintaining the exemption the Commissioner accepts that there is a clear public interest in the UK being able to maintain effective relations with international organisations. In the context of this case, for the reasons outlined by DBT, the Commissioner accepts that there is clear need for the UK Government to be able to maintain trusting and productive relations with the Commission. For the reasons set out above the Commissioner

⁴ <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-59673622>

accepts that disclosure of this information would directly disrupt such a relationship, an outcome which he accepts is firmly against the public interest.

24. On balance the Commissioner has therefore concluded that the of the public interest favours maintaining the exemption contained at section 27(1)(b). In reaching this decision the Commissioner considers that there is greater public interest in protecting the UK's ongoing relations with the Commission than the public interest in disclosure of this specific information.

Section 28(1) – Relations between the UK and Devolved Administrations

25. DBT withheld some information on the basis of section 28(1) which states that information is exempt from disclosure if it would, or would be likely to, prejudice relations between any of the administrations in the UK.

DBT's position

26. DBT argued that disclosure of parts of the withheld information would be likely to prejudice the UK's relations with the Scottish Government. In support of this position DBT explained that the information withheld on the basis of this exemption consisted of correspondence between its predecessor department and the Scottish Government's State Aid Team. DBT explained that there was a presumption that such an exchange of information would be treated in trust and confidence.
27. DBT argued that it was of paramount importance that the UK Government can communicate candidly to ensure state aid and subsidy control considerations can be effectively worked through, together with the consideration of any trade implications between nations before government policy can be progressed. DBT noted that the domestic subsidy control regime underpins competition in the UK internal market. DBT argued that it is essential that this works smoothly and is operated in a similar fashion in all parts of the UK so that all companies, especially potential inward investors, know that they will have equal treatment everywhere in the country. As a result DBT argued that there needs to be a flow of information and views between the UK Government and the devolved administrations.
28. DBT argued that disclosure of the information withheld on the basis of this exemption would put into question the ability for the UK Government and Scottish Government to conduct open, full, free, and a candid exchange of views in the future to test policy options. It emphasised that trust must flow both ways between Whitehall and the

devolved administrations, where the ability to speak freely and provide honest, open advice is crucial.

29. DBT also emphasised that the intention of the section 28(1) exemption is to protect and uphold good relations between the different administrations within the UK. DBT argued that it is fundamental to promote the smooth operation of government relations by ensuring Scottish, Welsh and Northern Ireland interests are represented in Westminster and the UK Government's responsibilities are fully and effectively represented in each of the nations. In DBT's view there must be the ability to utilise an open channel of communication enabling administrations to liaise and consult freely within the UK.
30. More specifically in relation to this request, DBT argued that it must be confident going forwards when developing policy and progressing initiatives in a sector as politically sensitive as steel, that such policy can be formulated with the full cooperation of the devolved administrations. DBT argued that release of the withheld information could lead to the poor, and siloed policy development in this sector. Trust would break down between Whitehall and the devolved administrations and make it far more difficult in the future to communicate effectively. DBT argued that this ongoing relationship is particularly crucial to preserve, given the high-profile nature of this sector in Scotland and Wales specifically.

The Commissioner's position

31. In terms of the first criterion set out above, the Commissioner accepts that the type of harm that DBT believes would occur if the information was disclosed is applicable to the interests protected by section 28(1) of FOIA.
32. Furthermore, with regard to the second and third criteria, the Commissioner accepts that if this information was disclosed it would undermine the relationship of trust and confidence between the UK and Scottish administrations given the content of the information and the basis upon which it was exchanged. The Commissioner also accepts that disclosure of information could impact on the free flow of information between the UK Government and other administrations if it was assumed that information of this nature would be disclosed in the future. The Commissioner has therefore concluded that the exemption contained at section 28(1) is engaged.

Public interest test

33. Section 28 is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest in favour of disclosing the information

34. The complainant's arguments for the disclosure of the information are set out above.

Public interest in favour of maintaining the exemption

35. DBT argued that it would be firmly against the public interest if the UK Government's relationship with the Scottish administration was damaged given that it is in the UK's own self interest to maintain a cooperative union of mutual trust. It noted that in its view disclosure of the information would be highly likely to be prejudicial to such a relationship for the reasons set out above.

Balance of the public interest

36. For the reasons also set out above, the Commissioner accepts that there is a considerable public interest in the disclosure of information on this topic. Disclosure of the information withheld on the basis of this exemption would provide a direct insight into discussions between the UK and Scottish administrations on this issue.

37. However, the Commissioner accepts that there is significant public interest in ensuring the relations between the UK Government and other devolved administrations are not undermined. In the particular context of this request the Commissioner notes DBT's point regarding the need to ensure such effective communications in respect of the steel industry. Furthermore, the Commissioner is also conscious of the broader impact that disclosure of the information could have, ie not just on relations between the UK and Scottish Governments on topics similar to this one, but between the UK Government and all administrations.

38. In light of this the Commissioner has concluded that on the balance of the public interest favours maintaining the exemption contained at section 28(1).

Section 43(2) – commercial interests

39. DBT withheld some of the information on the basis of section 43(2) of FOIA which provides an exemption for information if its disclosure

would, or would be likely to, prejudice the commercial interests of any party.

DBT's position

40. DBT argued that disclosure of the information would be likely to prejudice the commercial interests of Tata Steel and Liberty Steel. This was on the basis that the information in question contained commercially sensitive information about both companies. DBT explained that in reaching this conclusion it had had consulted both companies.
41. In order to support its reliance on section 43(2), DBT provided the Commissioner with detailed arguments to demonstrate how it considered such prejudice would be likely to occur. However, DBT considered such submissions to be confidential and therefore the Commissioner has not replicated them in the body of this notice.

The Commissioner's position

42. The Commissioner accepts that the first criterion of the three limb test described above is met as the potential prejudice described by DBT relates to the interests which the exemption contained at section 43(2) is designed to protect.
43. Furthermore, having considered the content of the withheld information, along with the detailed confidential submissions provided to him by DBT, the Commissioner is satisfied that disclosure of the withheld information presents a real and genuine risk of harming the commercial interests of both Tata Steel and Liberty Steel. The Commissioner cannot elaborate on why he has reached this particular finding without revealing the content of withheld information and/or the confidential submissions, nevertheless on the basis of such he is satisfied that section 43(2) is therefore engaged.

Public interest test

Public interest test

44. Section 43 is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest in favour of disclosing the information

45. The complainant's arguments for the disclosure of the information are set out above.

Public interest in favour of maintaining the exemption

46. DBT argued that there is a strong public interest in ensuring that the commercial interests of external companies are not damaged or undermined by disclosure of information which is not common knowledge, and which could adversely impact current or future business.
47. DBT also argued that it is also important that companies and the UK Government are able to have discussions relating to commercially sensitive information as this can play a key role in it formulating policy and understanding the challenges faced by companies as well as considering how to respond to those challenges. DBT argued that for such information to be shared, companies must be confident that, whilst the information remains commercially sensitive, the Government will treat the information with the appropriate care and seek to ensure that companies do not suffer unnecessary damage to their wider commercial interests and opportunities.

Balance of the public interest

48. For the reasons set out above the Commissioner accepts that there is public interest in disclosure of information falling within the scope of this request. As with the information withheld on the basis of the other exemptions, the Commissioner acknowledges that disclosure of the information withheld on the basis of section 43(2) would directly contribute to this public interest.
49. However, the Commissioner agrees that there is a clear public interest in ensuring that the commercial interests of companies are not harmed as a result of their engagement with government institutions. Taking into account the particular information in this case, and the consequences of disclosure, the Commissioner considers this to be a significantly more compelling argument.
50. The Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 43(2).

Section 42 – legal professional privilege

51. DBT applied section 42(1) to a small amount of information falling within the scope of this request. The Commissioner notes that such information is contained in communications from the Scottish Government which

were shared, on the presumption it would be treated confidentially, with a UK Government department. On this the basis the Commissioner is satisfied that such information is exempt from disclosure on the basis of section 28(1) for the reasons set out above. In light of this finding the Commissioner has not considered DBT's application of section 42(1) to such information.

Right of appeal

52. 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

53. 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.
54. 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

Jonathan Slee
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