

The Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **8 December 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 information about a UK-Israel trade and investment meeting in 2022. The request was addressed to the Department for International Trade (DIT), which is now the Department for Business and Trade (DBT) following the machinery of government changes in February 2023. DBT refused to disclose any of the information held within scope of the request, citing the exemptions at sections 27(1)(a) (international relations), 35(1)(a) (formulation of government policy) and 43(2) (commercial interests) of FOIA.
2. During the Commissioner's investigation, DBT issued a revised response to the complainant. It disclosed some information but withheld other information under sections 40(2) (personal information) and 43(2).
3. The Commissioner's decision is that whilst DBT is entitled to rely on section 40(2) to withhold the small amount of personal information in the two documents, DBT has failed to persuade him that section 43(2) is

engaged for the rest of the withheld information. The Commissioner also finds that DBT breached section 17 of FOIA, because DBT didn't provide the complainant with a refusal notice specifying all the exemptions on which it eventually came to rely, within the statutory time limit.

4. The Commissioner therefore requires DBT to take the following step to ensure compliance with the legislation.
 - Disclose the information withheld solely under section 43(2).
5. DBT must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA, and may be dealt with as a contempt of court.

Request and response

6. On 14 February 2023, the complainant wrote to DIT and requested information in the following terms:

"Please provide all notes, minutes and briefings related to the following meeting

Date: 3/2/2022

Host: Rt Hon Anne-Marie Trevelyan MP

Position: Secretary of State

Department: Department for International Trade

Lobbyist: UK-Israel Investor Breakfast ...

Purpose: To discuss UK-Israel trade and investment ...".

7. A week before the request, some machinery of government changes were announced. As part of the changes, DIT was merged with the Department for Business, Energy and Industrial Strategy to form DBT.
8. DBT responded on 14 March 2023, confirming that it holds information within scope of the request. However it said it was considering section 43 of FOIA, and needed more time to consider the public interest test.
9. DBT provided its substantive response on 12 May 2023. It explained that the information within scope of the request comprises two

documents (a 'briefing' and a 'readout') and refused to disclose any of the information, citing sections 27(1)(a), 35(1)(a) and 43(2) of FOIA.

10. Following an internal review, DBT wrote to the complainant on 19 July 2023. It stated that it was upholding its original application of the above exemptions.

Scope of the case

11. The complainant contacted the Commissioner on 19 July 2023 to complain about the way their request for information had been handled.
12. The complainant disputed all three exemptions applied by DBT.
13. During the Commissioner's investigation, DBT issued a revised response to the complainant on 4 October 2023. It disclosed redacted copies of the briefing and readout documents. DBT continues to withhold some information under section 43(2), and has applied an exemption not cited previously, section 40(2) (the personal information exemption), to other information. DBT is no longer relying on sections 27(1)(a) and 35(1)(a).
14. The Commissioner asked the complainant whether they were content for the case to be closed informally, given DBT's revised response, but the complainant remains dissatisfied and disputes both exemptions DBT now relies on.
15. The Commissioner therefore considers that the scope of this case is to decide whether DBT is entitled to rely on sections 40(2) and 43(2) of FOIA to withhold the remaining redacted information in the briefing and readout documents. He will also address any procedural breaches.
16. For the avoidance of any doubt, the Commissioner will not consider DBT's original refusal to disclose the information it eventually disclosed on 4 October 2023. The Commissioner explained this to the complainant on 5 October 2023.

Reasons for decision

Section 40(2) – personal information

17. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and one of the conditions listed in section 40(3A), 40(3B) or 40(4A) is satisfied.
18. In this case the relevant condition is in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (the DP principles) set out in Article 5 of the UK General Data Protection Regulation (UK GDPR).
19. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA). If it's not personal data, section 40 of FOIA can't apply.
20. If the Commissioner is satisfied the requested information is personal data, he must then establish whether disclosure would breach any of the DP principles.

Is the information personal data?

21. Section 3(2) of the DPA defines personal data as "any information relating to an identified or identifiable living individual".
22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name.
24. Information will relate to a person if it's about them, linked to them, used to inform decisions affecting them, has biographical significance for them or has them as its main focus.
25. DBT explained to the complainant that the information being withheld under section 40(2) is the names of junior government officials.
26. Having seen the withheld information, the Commissioner is satisfied that the information does relate to the data subjects. Clearly the names of the data subjects is information that both relates to and identifies those concerned.

27. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
28. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
29. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

30. Article 5(1)(a) of the UK GDPR states that personal data "shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
31. In the case of a request under FOIA, the personal data is processed when it is disclosed in response to the request. This means the information can only be disclosed if to do so would be lawful, fair and transparent.
32. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing.

Lawful processing: Article 6(1)(f) of the UK GDPR

33. The Commissioner considers that the lawful basis most applicable is Article 6(1)(f), which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data".
34. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information made under FOIA, it's necessary to consider the below three-part test.
 - Legitimate interest test: whether a legitimate interest is being pursued in the request for information.
 - Necessity test: whether disclosure of the information is necessary to meet the legitimate interest in question

- Balancing test: whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

35. The Commissioner considers that the 'necessity test' must be met before the 'balancing test' is applied.

Legitimate interests

36. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

37. A wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

38. In their correspondence with the Commissioner, the complainant mentions transparency. In particular, the complainant wants "full public transparency" regarding who was at the meeting of 3 February 2022 on behalf of the Government.

39. The Commissioner accepts the complainant's need for transparency as a legitimate interest.

Is disclosure necessary?

40. Necessary means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity, and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must be the least intrusive means of achieving the legitimate aim in question.

41. DBT told the complainant that the information being withheld under section 40(2) is "names of junior government officials".

42. In its submissions to the Commissioner, DBT said "it is not necessary to disclose ... the personal data of junior officials in the context of this request ...". It said disclosing the personal data "would not provide any additional value to the requester in the context of their FOIA request ...".

43. It also cited a previous decision notice and some guidance published by the Commissioner¹, to support its argument that personal data of junior officials is exempt from disclosure on the basis of section 40(2) of FOIA.
44. The Commissioner notes the request itself names the Rt Hon Anne-Marie Trevelyan MP as 'host' of the meeting of 3 February 2022. He also notes the name "Anne-Marie Trevelyan" was published in some 'transparency data' for DIT ministers' meetings, in connection with the 3 February 2022 meeting. Therefore, there is already some transparency about who attended the meeting on behalf of government (the complainant's stated interest).
45. Clearly the Commissioner, in his analysis, is unable to reveal the detail of the withheld information. However, having seen the withheld information for himself, he accepts DBT's point that disclosing the names of junior officials "would not provide any additional value to the requester ..." in this instance.
46. The complainant has said that section 40(2) can't apply to representatives of the companies attending the meeting, because those names are already in the public domain. However the Commissioner emphasises that DBT is not applying section 40(2) to any names of company representatives. In its revised response DBT clearly told the complainant that the withheld information comprises the names of junior government officials.
47. Whilst transparency is a legitimate interest, there is already information published about the fact that the meeting occurred and who attended.
48. Furthermore, the Commissioner agrees with DBT that in this instance, disclosing the personal data in question would add no real value in terms of transparency. He therefore considers it is not reasonably necessary.
49. As the Commissioner is satisfied that disclosure of the personal data of the junior government officials is not necessary, there is no lawful basis

¹ See <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025633/ic-182571-t1t5.pdf> and https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf (page 12)

for its disclosure. Therefore, DBT was entitled to rely on section 40(2) of FOIA to withhold the information.

Section 43(2) – commercial interests

50. Section 43(2) of FOIA provides that information is exempt if its disclosure would, or would be likely to, prejudice (harm) the commercial interests of any person, including the public authority holding it.
51. Based on DBT's revised response to the complainant and submissions to the Commissioner, the Commissioner's understanding is that DBT is claiming the lower level of likelihood ('would be likely to' prejudice); and that the commercial interests likely to be prejudiced, in DBT's view, are those of the various third-party companies named in the documents.
52. The Commissioner is prepared to accept that the envisaged harm relates to the type of interests the exemption is designed to protect, namely commercial interests, in this instance the commercial interests of the third parties. DBT told the complainant that the withheld information includes details about challenges encountered by some companies which, if disclosed, could be used by competitors, to the detriment of these companies. The Commissioner's understanding of DBT's comments is that DBT is also concerned about disclosure ultimately harming the ability of companies to secure contracts overseas, if companies become reluctant to share commercially sensitive information with government for fear of its disclosure.
53. However, DBT hasn't persuaded the Commissioner that a causal link exists between disclosure and the envisaged harm, and that the envisaged harm 'would be likely to' occur, as he explains in more detail below.
54. His guidance on section 43(2) discusses information about third parties², and says:

"... if you propose to withhold information because the disclosure would, or would be likely to, prejudice a third party's commercial

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/#432>

interests, **you must have evidence that this accurately reflects the third party's concerns.** It is not sufficient for you to simply speculate about the prejudice which might be caused to the third party's commercial interests. You need to consult them for their exact views in all but the most exceptional circumstances ... There may occasionally be situations where it is genuinely not possible to obtain the third party's views ... In these specific circumstances, you may present arguments regarding the likelihood of prejudice on the third party's behalf, **but they must be based on your prior knowledge of the third party's concerns. You need to provide evidence that your arguments genuinely reflect the third party's concerns"** (emphasis added in bold).

55. In this instance however, DBT didn't consult the third party companies, or even a sample of them. Neither did DBT show that its arguments are based on DBT's prior knowledge of the third parties' concerns, or provide evidence that they genuinely reflect the third parties' concerns.
56. DBT said "we have not consulted with the various entities as it would not be appropriate to engage with them on this subject about information that we have recorded and hold about them that they are not aware of".
57. DBT didn't explain this view further, and the Commissioner doesn't accept it. In particular, he doesn't see why it would be inappropriate for DBT to consult the third parties about disclosure of the 'readout' document comprising the minutes for the meeting of 3 February 2022.
58. DBT also said "DBT is not clear on the source of information that was consulted ... therefore is of the view that [the withheld information] ought to be protected in the various commercial interests of the multiple commercial entities listed". Presumably here DBT is referring only to the 'briefing' document (DBT didn't specify). However, clearly DBT is speculating about the prejudice, and the guidance quoted above makes clear that speculation is not sufficient.
59. The Commissioner emphasises that his request for submissions did say that if DBT failed to explain its position adequately, he would be more likely to uphold the complaint against DBT and that he would not usually revert to DBT for further explanations.
60. As DBT has failed to evidence that its arguments genuinely reflect concerns of the third parties in this case, the Commissioner is unable to

find that disclosure would be likely to prejudice the commercial interests of the third parties.

Procedural matters

61. The Commissioner finds that DBT breached section 17 of FOIA, because DBT didn't provide the complainant with a refusal notice specifying all the exemptions on which it eventually came to rely, within the statutory time limit. DBT didn't cite section 40(2) of FOIA until its revised response of 4 October 2023, during the Commissioner's investigation.

Right of appeal

62. 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

63. 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.

64. 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

Daniel Kennedy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF