

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 August 2024

Public Authority: Department for Business and Trade ("DBT")
Address: Old Admiralty Building
London
SW1 2DY

Decision (including any steps ordered)

1. The complainant has requested information on an appeal submission with regard to the refusal of an exporter's application to export goods to China. In response DBT provided redacted information and withheld other information in the scope of the request. DBT relied on FOIA sections 21 – information accessible to the applicant by other means, 40(2) - personal information, 36(2)(b)(i) and (ii) – prejudice to effective conduct of public affairs and 42(1) – legal professional privilege.
2. The Commissioner's decision is that DBT is entitled to rely on FOIA section 21, 40(2), 36(2)(b)(i), 36(2)(b)(ii) and 42(1) to withhold the remaining requested information.
3. The Commissioner finds that DBT has breached FOIA section 10(1) (time for compliance) by failing to provide the complainant with some information within the scope of the request within 20 working days. It has also breached FOIA sections 17(1)(b) by failing to identify which exemptions it was relying on within 20 working days and 17(3) in delaying the provision of its refusal notice.
4. The Commissioner does not require further steps.

Request and response

5. On 28 August 2023, the complainant wrote to DBT and requested information in the following terms:

"The attached was one of Three Appeal submissions I made to Department of Business & Trade via [a named individual] (receipt acknowledged) of the Export Control Joint Unit from 17th May 2023. As yet, unanswered by the Secretary of State.

I seek under FOI, all correspondence and associated documentation held by Department of Business & Trade in relation to this matter .

They delayed and delayed until they had made their decisions and there is no accountability."

6. DBT contacted the complainant on 26 September 2023 confirming that it held information in the scope of the request and advised that it required further time to consider the public interest test with regard to sections 36 and 42. It further responded on 16 November 2023. It stated that it was relying on FOIA sections 21 - information accessible to the applicant by other means, section 36 – prejudice to the effective conduct of public affairs, section 40 – personal information, section 41 – information provided in confidence, section 42 – legal professional privilege and section 43 – commercial interests to withhold information in the scope of the request. It provided information redacted in reliance of sections 40, 36, 43 and 42.
7. Following an internal review DBT wrote to the complainant on 11 January 2024 and upheld the initial response.

Scope of the case

8. The complainant contacted the Commissioner on 16 January 2024 to complain about the way their request for information had been handled. They subsequently explained:

"The blanket application of exemptions every that every single email, document etc was ruled nor disclosable – I accept some might have been but even Lehal Priv is not applicable to every communication.

If they are right ,the name of every single civil servant is now exempt , even *your name* would be 'secret' if Department of Business & Trade FOI application is valid. As a 'junior' civil servant my name was on my

sig block , letters and business cards – all paid for by the taxpayer and hence overt despite a job that carried real risk.”

9. During the course of the Commissioner’s investigation DBT changed its position regarding its reliance on FOIA sections 41 and 43. It determined that FOIA section 21(1) applied with regard to the information it had previously withheld under sections 41 and 43 because the requester in their role as the relevant exporter’s agent was able to access this information reasonably from the exporter. DBT acknowledged that at the time of its response and internal review it had considered disclosure of the information in question as disclosure to the world at large and relied on sections 41 and 43 for that reason. After reconsidering this position it no longer relies on these exemptions due to the identity of the requestor. The Commissioner notes that DBT informed the complainant of this change on 28 May 2024.
10. The Commissioner considers that the scope of his investigation is to consider DBT’s application of sections 21, 36(2)(b)(i) and (ii), 40(2) and 42(1).

Reasons for decision

Section 21- information accessible to the applicant by other means

11. Section 21 of FOIA states:

“(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

12. In its response to the complainant DBT relied on section 21(1) to refuse to provide information which was either generated by the complainant or information received by the complainant and/or the exporter concerned.
13. In conversation with the Commissioner’s representative the complainant accepted that the information set out in paragraph 12 would not form part of the scope of the Commissioner’s investigation.
14. However in its submissions to the Commissioner DBT also wishes to rely on section 21(1) with regard to information which it has determined is accessible to the complainant specifically due to their relationship with the exporter, as explained in paragraph 9.

15. The Commissioner notes his guidance¹ which states:

“The use of the expression “to the applicant” sets section 21 apart from other exemptions in Part II. Under subsection 21(1), the word “reasonably” qualifies accessible. This means that, unlike other exemptions in Part II of FOIA, section 21 requires you to take into account the applicant’s specific circumstances.

Effectively, section 21 draws a distinction between information that is available to the general public and information that the applicant can reasonably access outside of FOIA.”

16. The Commissioner has been provided with the evidence DBT relied on to determine this reliance which demonstrates that the complainant is acting on behalf of the exporter and therefore can reasonably access the information held by the exporter with respect to his role and which is no longer withheld under FOIA sections 41 and 43. The Commissioner considers it reasonable in these circumstances that section 21 applies.

17. As an absolute exemption no public interest test considerations are required.

Section 36 - prejudice to effective conduct of public affairs

18. Section 36(2) of FOIA states:

“(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act..

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation,

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

¹<https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-21-information-accessible-to-the-applicant-by-other-means/>

19. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person's opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure of the requested information.
20. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring but also that the opinion was reasonable in the circumstances. This means that the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against. A public authority may rely on more than one exemption in section 36(2) as long as the qualified person has offered a view on each of the exemptions cited and the arguments advanced correspond with the particular exemption.
21. DBT advised the Commissioner that the qualified person in this instance was Nigel Huddleston MP, Minister of State for International Trade. The Minister provided his opinion on 23 October 2023 that section 36(2)(b)(i) and (ii) were engaged.
22. 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.
23. The Commissioner is satisfied that, as a DBT Minister for State at the time, the person consulted about the request meets the definition of a qualified person set out by section 36(5) of FOIA.
24. The Commissioner was provided with copies of the submissions to the qualified person and his opinion on the engagement of the exemptions.
25. DBT explained that the exemptions were applied to case notes and records of advice held on its database which relate to application assessment and decisions made by DBT and other government departments.
26. DBT explained its view that disclosure of this information would inhibit the free and frank provision of advice and exchanging of views between officials and government departments which is integral to the deliberations around whether an export licence should be granted. It explained:

"In relying upon section 36(2)(b)(i) and (ii), the Department has had regard to the "chilling effect" the disclosure of such information may

have and the fact that the threat of future disclosure of such information is likely to hinder the frankness and candour deployed by officials when sharing their advice, in turn leading to poorer decision-making. Disclosure may impact the level of detail provided in future case notes, which would in turn hinder the Department's ability to conduct a thorough and well-informed risk assessment regarding export licence applications."

27. When deciding on the reasonableness of the qualified person's opinion, the test to be applied is whether the opinion is one that a reasonable person could hold and not whether it is the most reasonable opinion. As stated, the critical issue is that the arguments being advanced by the qualified person not only link to the factors described in the exemption but also relate to the information to which the exemption has been applied.
28. The Commissioner's guidance on section 36² makes clear that when he is considering a complaint regarding information withheld under section 36, he will consider all relevant factors to assess whether the opinion was reasonable. These may include, but are not limited to:
 - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of or involvement in the issue.
29. The qualified person's opinion must determine whether the prejudice or inhibition would or would be likely to occur. 'Would prejudice' means that it is more likely than not (ie a more than 50% chance) that prejudice would occur. 'Would be likely' is a lower standard which means that the chance of prejudice must still be significant and weighty, and

² <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

certainly more than hypothetical or remote, but it does not have to be more likely than not that it would occur.

30. The Commissioner notes that the qualified person has determined the level of prejudice to be "would be likely to prejudice". Taking into account the criteria set out in paragraph 29 the Commissioner is satisfied that the arguments presented by DBT are ones that relate to the activities described by the exemptions cited. He notes that the request was made whilst the appeal was still ongoing and the Secretary of State had yet to make a decision. He also accepts the opinion that disclosure of the information would be likely to result in the prejudice being claimed, to be one that a reasonable person could hold. He has therefore found that sections 36(2)(b)(i) and (ii) are engaged.
31. Each of the limbs of section 36(2) is a qualified exemption, which means that they are subject to the public interest test set out in section 2(2)(b). The Commissioner has therefore considered the arguments in favour of disclosing the information and those in favour of maintaining the exemption.

Public interest test

32. DBT explained that it had considered the arguments in favour of disclosure. It acknowledged that transparency improves engagement between the public and government and it is desirable that the public can satisfy themselves that government decisions are taken on the basis of the best available information.
33. However, DBT considered that disclosure of the withheld information in relation to its assessment of specific licence application appeals would be likely to result in prejudicing the integrity of the assessments made to the detriment of the public. It explained:

"There is a real concern that the nature and quality of the information provided in consideration of export licence application appeals and in internal emails between officials, would be significantly impaired by the risk the advice might in future be disclosed. For example, to avoid criticism of the views expressed during the assessment process, officials might simplify the information included in case notes and communications that relate to licence appeals i.e., officials might be less inclined to include the same level of detail as they do now. This would make it more difficult to take decisions on issues relating to export licensing because it is imperative that decisions are taken following a well-informed risk assessment, having considered all the information available including well thought out arguments concerning risk and impact."

34. DBT concluded that any arguments in favour of disclosure are outweighed by those in favour of withholding the information in the circumstances of this case.

The Commissioner's view

35. The Commissioner considers that there is always significant public interest in government departments operating in an open and accountable manner. He believes that greater transparency leads to better public understanding of particular issues. It therefore follows that transparency of government departments' actions must carry weight when balancing the public interest.
36. The Commissioner notes that the complainant has not provided any public interest arguments in his correspondence. Furthermore the Commissioner notes that the requested information is very specifically concerned with the complainant's involvement with a specific exporter which therefore holds particular significance for them. The Commissioner understands the complainant's particular reasons for requesting this information, however, such reasons do not necessarily carry a significant weight in considering the public interest.
37. DBT has explained the 'chilling effect' arguments it considers applicable in this case. The Commissioner has previously recognised that civil servants are expected to be robust when giving advice and not easily deterred from providing their views.
38. Nevertheless, in the circumstances of this case the Commissioner considers that DBT has advanced clear and persuasive arguments in favour of maintaining the exemptions cited and that there is a significant public interest in officials having the freedom to communicate freely and without concern about disclosure of those communications to the world at large. The Commissioner accepts DBT's arguments that disclosure of the information would be likely to inhibit the provision of advice and the free and frank exchange of views in the future which in turn would be likely to lead to less well informed decision making.
39. The Commissioner notes his previous decision³ concerning information regarding controlled goods licences and his considerations there are

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4025260/ic-214141-k8q7.pdf>

mirrored here. Disclosure of the withheld information in this case would be likely to impinge upon 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 in appeals concerning the export of controlled goods.

40. The Commissioner acknowledges the public interest in openness about issues such as licences for the international sale of controlled goods and the factors taken into account by government in considering appeals against its decisions. However, in the circumstances of this case, there is a stronger public interest in protecting DBT's ability to be able to analyse, seek advice, and deliberate its response to any such appeals.
41. Consequently, he is satisfied that the public interest favours maintaining the exemptions and DBT was entitled to rely on FOIA section 36(2)(b)(i) and (ii) to withhold the information to which it applied these exemptions.

Section 42 – Legal professional privilege

42. Section 42 of FOIA states:

"(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

43. There are two categories of legal professional privilege ("LPP") – litigation privilege and legal advice privilege. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
44. LPP protects the confidentiality of communications between a lawyer and client. The complainant stated that "not all documents are Legal [sic] priv.". The Commissioner would explain that DBT is relying on this exemption only to withhold limited information, not all the information it holds in the scope of the request.
45. DBT explained to the Commissioner:

"Any advice from the Department's legal team to the Export Control Joint Unit ("ECJU") in DBT constitutes legal advice provided to a client, as DBT Legal are our lawyers and we in ECJU are their client."
46. DBT advised that the communications were solely for the purpose of obtaining legal advice and were communicated in a professional

capacity. The advice has not been shared publicly and has remained confidential within DBT.

47. The Commissioner has seen the withheld information and is satisfied that it attracts LPP; he therefore finds that section 42(1) is engaged. He will now progress to consider the public interest as set out in section 2(2)(b).

Public interest test

48. In favour of disclosing the information DBT advised the Commissioner that it considers there to be a public interest in public authorities being accountable for the quality of their decision making and ensuring that decisions have been made on a sound evidential basis. It considers that good quality legal advice forms part of that accountability.
49. In favour of withholding the information DBT noted the strong public interest in recognising and upholding the importance of the principle behind legal professional privilege. It considered safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. DBT also referenced that the courts have recognised the inherent public interest in maintaining LPP.
50. DBT explained:

“In this case, we consider that the public interest in withholding the information is high. It is in the public interest that decisions taken by government are taken in a fully informed legal context. Legal advice to government must be given with a full appreciation of the facts and allowing exploration between legal advisers and policy officials as to the possible arguments both for and against a particular view, weighing up their relative merits. Without such full, comprehensive and dynamic advice, the quality of the government’s decision making would be much reduced, because decision makers would not be fully informed of the legal context of the decision.”

The Commissioner’s view

51. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of LPP. In his view, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP as referenced by DBT in paragraph 50 - safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. In his view, that principle is fundamental to the administration of justice and disclosing any legally privileged information threatens that principle.

52. The Commissioner agrees with DBT in regard to the public interest in openness and transparency and he acknowledges the value in providing access to information to enable the public to understand more fully the conduct of government departments.
53. However, in order to equal to or outweigh the inherent public interest in maintaining the exemption the Commissioner considers that there must be a compelling argument for disclosure to override the strong element of public interest inbuilt into the privilege itself. In this case the Commissioner has not been presented with any such argument and therefore considers the public interest is in favour of maintaining the exemption.
54. The Commissioner's decision is that in the circumstances of this case DBT correctly applied the section 42(1) exemption.

Section 40 – Personal information

55. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
56. In this case the relevant condition is contained 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'), as set out in Article 5 of the UK General Data Protection Regulation ('GDPR').
57. At the beginning of his investigation the Commissioner discussed with the complainant the application of FOIA section 40(2), third party personal data with regard to names, contact numbers and email addresses of DBT staff. The Commissioner's guidance⁴ at page 12 explains:

"It is reasonable to expect that public authorities disclose more information about senior public authority employees than more junior ones. Senior employees should expect their posts to carry a greater level of accountability, since they are likely to be responsible for major

⁴ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

policy decisions and the expenditure of public funds. For example, a junior employee who is not accountable for their submissions to a senior government minister has no expectation that their name will be disclosed in response to an FOI request.”

58. The Commissioner has made determinations on this matter in many previous decisions, two⁵ of which are referenced below to illustrate the tests he applies when considering section 40(2), which he has therefore not repeated here. He is satisfied that the redactions made by DBT concern junior civil servants ie officials at Grade 6 or below.
59. In this case the Commissioner considers that disclosing the requested information would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the GDPR. DBT was therefore correct to apply section 40(2) of FOIA to this request.

Procedural matters

60. Section 1(1) provides that any person making a request for information to a public authority is entitled, subject to exemptions;
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have the information communicated to him.
61. Section 10(1) provides that public authorities must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4029469/ic-262866-j1n5.pdf>

<https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024465/ic-174200-p5q0.pdf>

62. Section 17(1) provides that a public authority must issue a refusal notice in respect of any exempt information within the same timescale.
63. Section 17(3) allows a public authority to claim a "reasonable" extension to the statutory 20 working days limit, if necessary, to consider the balance of the public interest test.
64. FOIA does not define how long a reasonable time is. The section 45 Code of Practice on request handling states that "it is best practice for an extension to be for no more than a further 20 working days".⁶ This means that the total time spent responding to a request should not exceed 40 working days unless there are exceptional circumstances.
64. In this case DBT provided the complainant with its substantive response and some of the requested information after 58 working days. The Commissioner does not consider there to have been exceptional circumstances in this case and has therefore found that the delay in providing a substantive response resulted in DBT breaching FOIA section 17(3).

6

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

65. 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

66. 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.
67. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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