

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 July 2021

Public Authority: Department for International Trade
Address: 3 Whitehall Place
London SW1A 2AW

Decision (including any steps ordered)

1. The complainant has requested copies of named documents regarding UK/US trade discussions that were allegedly leaked. The Department for International Trade ("DIT") refused to confirm or deny whether it held such information and cited section 27(4) (prejudice to international relations) and section 35(3) (formulation/development of government policy) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that DIT is entitled to rely on section 27(4) as its basis for refusing to confirm or deny whether it holds the requested information.
3. No steps are required.

Request and response

4. On 14 February 2020 the complainant requested information of the following description:

"I would like to obtain the following six documents, which were produced by the Department for International Trade:

1. Full read-out of a meeting held by the "UK-US Trade & Investment Working Group" on 24-25 July 2017 (46 pages long). This document has been marked "Official-Sensitive (UK eyes only)".
2. Full read-out of a meeting held by the "UK-US Trade & Investment Working Group" on 13-14 November 2017 (64 pages long). This document has been marked "Official-Sensitive (UK eyes only)".
3. Full read-out of a meeting held by the "UK-US Trade & Investment Working Group" on 21-22 March 2018 (77 pages long). This document has been marked "Official-Sensitive (UK eyes only)".
4. Full read-out of a meeting held by the "UK-US Trade & Investment Working Group" on 10-11 July 2018 (144 pages long). This document has been marked "Official-Sensitive (UK eyes only)".
5. Full read-out of a meeting held by the "UK-US Trade & Investment Working Group" on 2-7 November 2018 (116 pages long). This document has been marked "Official-Sensitive (UK eyes only)".
6. High level read-out of a meeting held by the "UK-US Trade & Investment Working Group" on 10-11 July 2019 signed by Oliver Griffiths on 12 July 2019 (4 pages long). This document has been marked "Official-Sensitive".
5. On 7 April 2020, DIT responded.¹ It refused to confirm or deny that it held the requested information and cited the FOIA exemptions at section 27(4) (international relations) and 35(3) (formulation/development of government policy) as its basis for doing so.
6. The complainant requested an internal review on 8 April 2020. DIT sent him the outcome of its internal review on 9 June 2020. It upheld its original position.

Scope of the case

¹ The Commissioner notes that public authorities are required to provide a response in accordance with section 1 of the FOIA within 20 working days. Failure to do so contravenes section 10 and/or 17 of the FOIA.

7. The complainant contacted the Commissioner 29 June 2020 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether DIT is entitled to rely on section 27(4) and section 35(3) as its basis for refusing to confirm or deny whether it held the information described in the request.

Reasons for decision

Background

9. DIT set out the following information by way of background:

"DIT held six UK-US Trade and Investment Working Group meetings between July 2017 and July 2019. Summaries of these meetings were published on gov.uk after each meeting ... ²"
10. It explained that it learned in November 2019 via social media of claims of alleged leaked readouts from these meetings. At the end of the month and in the run up to a general election in the UK, the Leader of the Opposition, revealed what he claimed to be leaked documents from the aforementioned Working Group. The DIT's public comment on the matter was as follows:
 - *"The UK government does not comment on leaks.*
 - *Ahead of a future launch of FTA³ negotiations, UK and US government officials have met to build understanding of each other's systems, laws and regulations.*
 - *These were preliminary sessions, aimed at getting a clearer understanding of what each country's respective policies and arrangements are. They should not be seen as anything more".*

Section 1(1)(a) – Neither confirm nor deny

² It provided links to gov.uk webpages but unfortunately they were broken. The Commissioner assumes they are the meetings detailed on this webpage: <https://www.gov.uk/government/groups/uk-us-trade-and-investment-working-group#meeting-statements>

³ Free Trade Agreement

11. The right of access under FOIA is in two parts. Section 1(1)(a) provides a right to receive confirmation or denial from a public authority as to whether requested information is held. Section 1(1)(b) provides a right to be provided with that requested information where it is held. Both rights are subject to exemptions. Clearly, if a public authority is not obliged to comply with section 1(1)(a) because an exemption applies, it is not obliged to provide requested information where that is held. In this case, DIT is arguing that it is exempt from its duty to comply with section 1(1)(a). This position is widely referred to as "NCND" – neither confirm nor deny.

Section 27 – prejudice to international relations

12. Section 27(4) of FOIA provides an exemption from complying with section 1(1)(a) of FOIA if to do so would, or would be like to, prejudice the interests protected by section 27(1). DIT said that the relevant interests were section 27(1)(a) relations between the United Kingdom and any other State, as well as, section 27(1)(c) the interests of the United Kingdom abroad, and section 27(1)(d) the promotion or protection by the United Kingdom of its interests abroad.
13. As noted above, DIT explained that the documents referred to in the request were allegedly leaked. There has also been a related FTT⁴ (EA/2019/0154⁵) judgment. In that case, although the issue under consideration was not NCND, the FTT makes reference to documents mentioned in the request under consideration in this case as 'allegedly leaked' (para 45).
14. In support of its position regarding the use of NCND, DIT commented that FTT '...did not require the DIT's witness..., to answer questions about them in open session or make any findings in the open part of our decision as to their authenticity. (Para 45). Implicitly, DIT's NCND position has been confirmed by the FTT.
15. At issue here is whether DIT is entitled to take an NCND approach even if there is a lot of information in the public domain, to indicate that the meetings described in the request took place. It would therefore seem unlikely that there no records or analysis of these meetings. Is it

⁴ First Tier Tribunal (Information Rights)

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2691/Montague,%20B%20-%20EA2019-0154,%20\(26082020\)%20AMENDED%20DECISION.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2691/Montague,%20B%20-%20EA2019-0154,%20(26082020)%20AMENDED%20DECISION.pdf)

therefore sustainable that DIT can take an NCND position in respect of the information described in the request?

16. In this context, in order for a prejudice based exemption such as section 27 to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the public authority confirmed whether or not it held information relevant to the request 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 confirmation or denial of the information being requested and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, confirmation or denial 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
17. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'.
18. DIT asserted that confirming the authenticity of the documents "would prejudice the UK's international relations with the US, the interests of the UK abroad and the promotion by the UK of its interests abroad". It asserted that "The original leaking of the information caused significant harm to the relations between the US and UK".
19. It reiterated this point and emphasised that confirmation or denial would "risk the US deciding not to share sensitive information with us when trade agreement negotiations begin again. The impact of this would cause harm to future US-UK trading relationships, harming the interests of the UK abroad and our ability to protect those interests."

20. The Commissioner will focus on DIT's arguments with respect to section 27(1)(a), namely prejudice to relations between the United Kingdom and any other State – in this case, the US.
21. With regard to the first criterion, the Commissioner accepts that the potential prejudice described by DIT clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect. That is not to say that the exemption automatically applies.
22. With regard to the second criterion the Commissioner has considered whether there is a causal link between DIT confirming whether or not it holds the requested information and harm occurring to the UK's relationship with the US.
23. When a public authority takes a position of NCND, it must do this consistently and not, for example, only provide an NCND response if it holds information but does not want to reveal it holds it. In such a case, if it only gave an NCND response when information is held but denied holding it when it did not hold it, an NCND response would, in effect, mean confirmation that information is held.
24. DIT argues that it must take an NCND approach in this case, regardless of whether it actually holds the information or not, because it seeks to avoid the prejudice that it believes would arise in relations with the US if it gave a response which undermined the expectation of confidentiality surrounding documents relating to trade discussions. It emphasised the importance of neither confirming nor denying the authenticity of allegedly leaked information. It explained that this was important here and in any future situations of a similar nature.
25. FOIA gives access to information and not to documents. However, the request describes very specific documents and the request can therefore be considered to be for information in documents which match the description in the request.
26. DIT has also taken the position that complying with section 1(1)(a) "would" give rise to prejudice to the UK's relations with the US. It must meet a higher threshold than it set for "would be likely".
27. Quoting from a report of the Public Administration Committee, DIT accepted that "leaks [are] an occupational hazard in government"⁶. DIT

⁶ <https://publications.parliament.uk/pa/cm200809/cmselect/cmpubadm/83/8305.htm>

explained the importance of maintaining a stable relationship with negotiating partners. It said that it would negatively affect its reputation with the US and other countries (sections 27(1)(c) and (d) also refer) if it took steps which undermined the confidentiality required for international negotiations. It said that in this case the alleged leak had already damaged relations. It did not provide specific detail to support this assertion, for example, by providing an overview of additional communications on this subject. While this point remains an assertion without additional supporting arguments, the Commissioner finds it difficult to accept that compliance with section 1(1)(a) would give rise to prejudicial outcomes. However, she is prepared to accept that the lower threshold of "would be likely to" is met. It is reasonable to assert, as DIT has done here, a likely causal link between complying with section 1(1)(a) in this context – where there is an allegation of an information leak – and the risk of undermining confidentiality in discussions with other states.

28. In relation to the third criterion, the Commissioner is satisfied that this likelihood of this prejudice occurring is one that is more than hypothetical; rather there is a real and significant risk. The Commissioner was disappointed at the paucity of DIT's arguments on this point. It did not provide particularly detailed arguments. It asserted that confirmation or denial would create an impression that the UK side could not adhere to mutual communications protocols. As noted above, the Commissioner is not convinced that this outcome would occur, particularly given DIT's own submissions which fail to provide convincing arguments to support its use of this higher threshold. However, she is satisfied that it is likely to occur.
29. In reaching this view, the Commissioner has taken into account that, due to the UK's exit from the European Union, it is responsible for making new trading agreements with other countries. Although DIT did not substantiate its assertion, the Commissioner accepts that negotiations could well have been impacted by the story such that mitigating steps may well have been required. As noted above, the FTT has previously recognised that prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'.
30. The Commissioner therefore agrees that Section 27(4) is engaged.

Public interest test

31. Section 27(4) is a qualified exemption. Therefore, the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in

maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held.

Public interest arguments in favour of confirming or denying whether the information is held

32. The complainant made a number of points as to why full disclosure is in the public interest:

- The requested documents are at the heart of claims of election interference.
- This point has been covered in national media.⁷
- The withholding of information could be perceived as a political decision. Implicitly, given that this is not a valid reason for withholding information, DIT's arguments do not succeed.

33. DIT made the following points in favour of providing confirmation or denial:

- "there is always a public interest in transparency and accountability, when discussing trade matters and negotiating free trade agreements with other countries. The UK-U.S. free trade agreement has attracted significant public interest. Confirming these documents exist could further the understanding of, and participation in, the public debate of issues of the day"
- "additional transparency could arguably promote accountability in how public money is being spent on trade negotiations since trade deals have impacts on communities and individuals"
- "an informed and involved public is important and that is why we promoted the meetings taking place at the time and published regular summaries about them on gov.uk."

34. It also provided arguments which the Commissioner is, regrettably, unable to put on the face of the notice without compromising DIT's position. The Commissioner is disappointed that DIT did not apply its arguments more directly to the principle of NCND as it applies to this case.

Public interest arguments in favour of maintaining the exemption

⁷ <https://www.bbc.co.uk/news/blogs-trending-51776404>

35. Understandably, the complainant did not submit any arguments in favour of maintaining the exemption, nor did the Commissioner expect them to.
36. DIT argued that the UK's international relations depend upon maintaining the trust and confidence of other states and international organisations. It said this would be undermined by confirmation or denial in this case by establishing the authenticity or otherwise of the leaked documents. It said that the public interest favoured maintaining the exemption to avoid undermining this approach.
37. It explained how important confidentiality was to trade negotiations and that the UK's reputation in trade negotiations relied upon ensuring confidentiality. It stressed the public interest in doing so given the importance of trade negotiations with the US at the moment.

Commissioner's decision

38. The Commissioner recognises the strength of the complainant's arguments here. Concerns have been raised about foreign interference in the UK's election. The specific allegation here is that the documents described in the request were leaked via foreign actors. This is because of the apparent origin of the online accounts where the allegedly leaked documents originally appeared. There is a significant public interest in informing that serious concern with evidence as to whether the documents were or were not authentic. If they were authentic, the question arises of how they came to be leaked via an apparently foreign mechanism and why. If they were not authentic, the question arises as to why such documents appeared from an apparently foreign source. Providing confirmation or denial would serve that public interest because it would inform that important public discussion.
39. There is also an important public interest in transparency and accountability in respect of trade negotiations with other countries following the UK's exit from the EU.
40. However, the Commissioner recognises there is a slightly stronger public interest in protecting the integrity of international trade discussions through maintaining confidentiality and trust. Providing confirmation or denial in this case would be likely to undermine it. While each FOIA request must be treated on its own merits, the Commissioner recognises the public interest in protecting the safe space in which international trade discussions are held. The Commissioner notes that discussions were ongoing at the time of the request which adds weight to the public interest in favour of maintaining the exemption in this case. Making any comment about the authenticity or otherwise of allegedly leaked

documents could undermine this safe space, contrary to the public interest in advancing international trade discussions.

41. The Commissioner therefore agrees that DIT is entitled to rely on section 27(4) as its basis for refusing to provide confirmation or denial as to whether the requested information is held.
42. Given the Commissioner's decision with respect to section 27(4), she has not gone on to consider whether DIT can also rely on section 35(3).

Right of appeal

43. 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

44. 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.
45. 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

Alexander Ganotis
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