

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 January 2018

Public Authority: Department for Business, Energy & Industrial Strategy

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested a copy of a letter sent to the CEO of Nissan from the Secretary of State for Business, Energy & Industrial Strategy. The Department for Business, Energy & Industrial Strategy (BEIS) originally withheld the letter under sections 22(1) (information intended for future publication) and 43(2) (prejudice to commercial interests) of the FOIA and latterly applied section 29(1) (a) (prejudice the economic interests of the United Kingdom or of any part of the United Kingdom) during the Commissioner's investigation. The Commissioner's decision is that BEIS correctly withheld the letter under section 22(1) of the Act and that at the time of the request the public interest balance favoured maintaining the exemption. She does not therefore require BEIS to take any steps as a result of this notice. However, the Commissioner has found that BEIS breached section 10(1) of the FOIA by failing to provide a substantive response to the request within 20 working days.

Request and response

2. On 26 November 2016, the complainant wrote to BEIS and requested information in the following terms:

'Copy of the letter sent to Nissan as part of assurances given by the Government re EU exit'

3. The Department acknowledged receipt of the request on 28 November 2016 and advised that they were considering the same. BEIS stated that they would respond at the latest by 28 December 2016.
4. On 11 January 2017 the complainant notified the ICO that BEIS had failed, despite chaser emails, to provide him with a response to his request.
5. On 14 February 2017 the Commissioner wrote to BEIS and asked them to provide the complainant with the outstanding substantive response to his request by no later than 28 February 2017.
6. The Department provided the complainant with a substantive response to his request on 24 February 2017. BEIS confirmed that they held the requested information but that it was exempt from disclosure under sections 22(1)(information intended for future publication) and 43(2)(prejudice to commercial interests). The Department advised the complainant that they would write to him again to ensure that he was informed of where he could see a copy of the letter when it was released.
7. The complainant requested an internal review and the Department provided him with the same on 29 March 2017. The review upheld both exemptions and again advised the complainant that they would notify him when the letter was released.

Scope of the case

8. The complainant contacted the Commissioner on 29 March 2017 to complain about the way his request for information had been handled. The complainant was of the view that *'there is overwhelming public interest in seeing what kind of financial commitments have been made'* and asked the Commissioner to take the following factors into account in her investigation:
 - *'Right of public to know what kind of financial commitments have been made on taxpayers behalf;*
 - *EU rules expressly forbidding state aid – if the letter applies to the current state as well as the future situation, these could have been breached'*. The complainant contended that in this case the Department's refusal to disclose the letter *'can be considered a "cover up"'*;
 - *'Right of all manufacturers to the equal treatment under the law'*. The complainant contended that by not releasing the letter BEIS

were *'giving Nissan preferential treatment over other car manufacturers'*.

The complainant stated that he was *'stunned that BEIS think that public right to know does not overweight(sic) any potential interest in case of such importance as Brexit and associated promises made by the Government'*.

9. The Commissioner has had sight of the withheld information in this case, which is a letter dated 21 October 2016 from the Secretary of State for Business, Energy & Industrial Strategy, Mr Greg Clarke MP to the then CEO of Nissan, Mr Carlos Ghosn.
10. The scope of the Commissioner's investigation has been to determine whether BEIS correctly withheld the requested information ('The Nissan Letter') under the exemptions applied.

Reasons for decision

11. Section 22(1) provides that –

'Information is exempt information if-

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).'

12. Section 22(1) is qualified by a public interest test.

13. There are, therefore, four questions to consider:

- Is there an intention to publish the requested information at some future date?
- Was the information already held with a view to publication at the time the request was made?

- Is it reasonable to withhold the information from disclosure until the intended date for publication?

Where the answer to the above three questions is "yes", the exemption is engaged but a fourth question must be addressed:

- Does the public interest favour maintaining the exemption or disclosing the information?

Is there an intention to publish the requested information at some future date?

14. In their 24 February 2017 response to the request, BEIS noted that during his first appearance before the BEIS Select Committee on 14 December 2016¹, the Secretary of State, Mr Clarke, had stated that it was his intention to publish the Nissan Letter once the particular commercial confidentialities for the automotive company are no longer there. Given the clear statement given by the Secretary of State, the Commissioner is satisfied that there is an intention to publish the Nissan Letter.

Was the information already held with a view to publication at the time the request was made?

15. In order to correctly rely on section 22, there must have been a settled intention to publish the requested information prior to the request being received. The Commissioner notes that the complainant made his information request on 26 November 2016. In submissions to the Commissioner, BEIS advised that the intention to publish the letter in future was first formed on 21 October 2016 (the date of the letter) by the Secretary of State, Mr Clarke. The Department advised that the very fast moving nature and sensitivity of events meant that such intention was communicated verbally in internal discussions and the Commissioner's enquiries ascertained that the only written record of the intention was a note in the personal (hard copy) diary of the senior official handling Nissan at the time. Unfortunately, this note was not readily accessible to the Department at the time of the Commissioner's enquiries as the diary was with the senior official and they were on sick

1

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/business-energy-and-industrial-strategy-committee/work-of-the-department-201617/oral/44725.pdf> at Q 115.

leave. However, the Commissioner is satisfied with the Department's written confirmation that there was a settled intention to publish the letter in future at the time that the Secretary of State wrote to Nissan on 21 October 2016. In submissions to the Commissioner, BEIS noted that the Secretary of State had communicated the intention to publish the Nissan Letter during his appearance before the BEIS Select Committee on 14 December 2016 (more than two weeks after the request) but confirmed that that was the public statement, rather than the point at which the intention was reached.

16. In light of the confirmation provided by BEIS in submissions, the Commissioner is satisfied that the intention to publish the Nissan Letter predated the complainant's request by just over one month.

Is it reasonable to withhold the information from disclosure until the intended date of publication?

17. A public authority must consider whether it is reasonable, in all the circumstances, to withhold the information until the date of publication. In submissions to the Commissioner, BEIS noted that the Government has been clear that the publication date of the Nissan Letter is linked to the commercial sensitivity of the content. BEIS advised that Nissan are still in the process of conducting '*the largest and probably most complex parts procurement exercise in the history of the UK automotive sector*'. The Department advised the Commissioner that the more significant negotiations had been expected to be completed and award decisions made by around the end of 2017. However, given the scale of the Nissan investment and procurement exercise, which is still underway, the expected date of publication had slipped somewhat. BEIS advised the Commissioner that they expected the exercise to conclude in the first quarter of 2018 and for the letter to be published around this time, when the commercial sensitivities would reduce.
18. The Department advised the Commissioner that they considered that it was reasonable not to publish the letter whilst the relevant information remained commercially sensitive. Given that the Nissan Letter is due to be published relatively soon, and given that the Government has already provided some degree of transparency as to the contents of the letter (as noted below in the public interest analysis), the Commissioner considers that it is reasonable to withhold the letter until the expected date of publication.

Public interest test

19. The exemption at section 22(1) is qualified by a public interest test. Therefore, the Commissioner has considered whether in all the circumstances of the case, the public interest in maintaining the

exemption outweighed the public interest in disclosure at the time of the request.

20. As previously noted in paragraph 8 above, the complainant has contended that there is an '*overwhelming*' public interest in seeing what kind of financial commitments have been made to Nissan by the Government and has specified several elements of this public interest.
21. In their response to the request, BEIS recognised that there is '*a public interest in releasing information to increase the transparency and accountability of Government*'. In submissions to the Commissioner the Department specified that the public interest in the release of the Nissan Letter relates to both the Government engagement with the company at the time (October 2016) '*and the eventual, actual Government support for the investment*'. In relation to the former, BEIS noted that the Secretary of State had given a number of accounts to Parliament about his engagement with Nissan. In relation to the investment itself, the Department stated that although there is a public interest in knowing how much public funding is eventually provided, '*the figures in the letter remain subject to due diligence and the public interest in releasing them is reduced*'.
22. In response to the complainant's allegations about State Aid and preferential treatment for Nissan, BEIS stated that in his statement to the House of Commons on 31 October 2016² about the company's investment in the Sunderland plant, the Secretary of State set out details of the assurances provided to Nissan and the wider automotive industry. The Department stated that:

'The Business Secretary gave four assurances and the first was that the Government would continue a long-standing programme of support for the competitiveness of the automotive sector, including Nissan. This support is available to firms for skills and training the local workforce, research and development and innovation, in line with EU and UK Government rules. Since 2010, the Government has invested £400 million in the UK automotive sector in this way. All proposals from any company must be underpinned by strong business cases and tested against published eligibility criteria. All proposals are also subject to rigorous external scrutiny by the Independent Industrial Development Advisory Board and are reported to Parliament. Therefore, no preferential treatment was given to Nissan.'

² <https://hansard.parliament.uk/Commons/2016-10-31/debates/3BAC6B0F-E41B-431D-8062-C42D89C9ADA8/NissanSunderland>

23. With regard to the commercial sensitivities of some of the information contained in the letter, BEIS emphasised in their responses to the request that **all** 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*'. The Department advised the Commissioner that Nissan had been provided with assurances that '*any commercial info would in any case be treated in the strictest confidence*'. Nissan had advised BEIS that the letter contained commercially sensitive information that would enable competitors, counterparts and potential component suppliers to deduce the size of their planned investment. Nissan considered that such knowledge would adversely affect the on-going negotiations with potential contractors for the new models to be built in Sunderland. Such negotiations were ongoing at the time of the complainant's request and remained so at the time of the Department's submissions being provided to the Commissioner.
24. The Commissioner notes that there has been considerable speculation about the contents of the Nissan Letter and what financial commitments may have been made to Nissan by the Government. The letter and the Secretary of State's comments in relation to the same have been widely reported in the media. The Commissioner recognises and entirely accepts, as the complainant has contended, that there is an important public interest in transparency and accountability where Government makes financial commitments to companies, particularly in the context of Brexit and the uncertainty created as a result.
25. However, the Commissioner would note (as BEIS have stated in submissions) that the Secretary of State provided significant and important details of the assurances which the Government had given to Nissan with regard to their Sunderland investment in his statement to the House of Commons on 31 October 2016 (less than one month prior to the request). The Secretary of State explained that in the Department's discussions with Nissan it became clear that four assurances were important to securing the investment for the UK. Three of these assurances were about the automotive sector generally and one was about Brexit. Whilst not specifying any financial commitments or amounts, the Secretary of State provided significant information in respect of each assurance given and was also clear about the limits of the assurances given to Nissan (e.g. the Secretary of State noted that it was not in his gift to offer tariff-free access to the single market and that they had not discussed any particular models of access to the European market).

26. During his later appearance before the BEIS Select Committee on 14 December 2016, the Secretary of State reiterated the four assurances and stated that, *'What I said to Nissan and would say to any company is that I understand and we understand the importance, as part of our negotiation, to look to secure the continued access, tariff-free, to the single market and to avoid the kind of bureaucratic impediments that will disrupt trade'*. Importantly, in view of the complainant's allegation that the Government has given preferential treatment to Nissan over other car manufacturers, the Commissioner notes that the Secretary of State was clear that he was *'talking to lots of companies'* and in July 2017 it was widely reported in the media that the UK Government had provided Toyota with a similar letter of assurance in respect of that car manufacturer's decision to proceed with a £240m investment at its Burnaston plant in Derbyshire.³ The Commissioner notes that the Department has similarly not released a copy of the letter sent to Toyota but this indicates that Nissan has not been given preferential or special treatment over other car manufacturers.
27. In light of the above circumstances and context, the Commissioner considers that a significant and important level of transparency and accountability had already been met at the time of the complainant's request, through the Secretary of State's statement to the House of Commons on 31 October 2016. This was confirmed by the Secretary of State's subsequent appearance before the BEIS Select Committee on 14 December 2016 when he was questioned about the Nissan Letter.
28. The Commissioner recognises that of the four public interest arguments advanced by the complainant that of transparency and accountability as to any financial commitments given to Nissan by the Government has not yet been met. However, BEIS have confirmed that the figures in the letter remain subject to due diligence and have contended that the public interest in this respect lies in the eventual *'actual'* Government support for the investment. Whilst the Commissioner would agree with the complainant that there is important public interest in knowing what financial commitments have been given to Nissan by the Government, that transparency and accountability would apply to the finalised actual figures (which may or may not differ from those in the letter).
29. With regard to the Department's contention that information contained in the letter remains commercially sensitive, the Commissioner notes that when questioned about the letter by the Committee, the Secretary

³ <http://www.businesstimes.com.sg/transport/uk-govt-gives-toyota-assurance-to-bag-%C2%A3240m-investment>

of State stated that *'there are aspects that are commercially confidential'*. Having had sight of the withheld information the Commissioner is satisfied, as indicated by the Secretary of State's statement above, that not all the information contained in the letter is commercially sensitive and indeed the Commissioner considers that the greater portion of the information contained in the letter could not be considered to be commercially sensitive. However, the Commissioner is satisfied that the non-commercially sensitive parts of the letter largely reflect and are consistent with the information provided to the House of Commons and the BEIS Select Committee by the Secretary of State on the aforementioned occasions. In view of this, and the fact that the Department intends to publish the Nissan Letter in the near future, the Commissioner does not consider that the public interest in the non-commercially sensitive parts of the letter is such that it requires a redacted disclosure of such information in advance of the anticipated publication date.

30. In cases where the withheld information contains information which is commercially sensitive to companies and/or financial information which has yet to be finalised and which remains subject to due diligence, the Commissioner considers that a careful and proportionate balance must be struck. That balance is between the legitimate and important public interest in transparency and accountability of Government discussions with companies, particularly in the context of Brexit and where financial commitments are made by Government, and the public interest in ensuring that trust and confidence is maintained between companies, particularly those who provide significant levels of jobs and employment in the UK, and Government.
31. The Commissioner considers that were BEIS to disclose the Nissan Letter in breach of assurances given to Nissan, at a time when some of the information remains commercially sensitive, then this would adversely impact not only Government relations with Nissan, but would be likely to undermine the Government's engagement with other companies (car manufacturers and otherwise) who provide and share commercially confidential information with Government.
32. In this particular case, in view of the significant information already provided about the Nissan Letter by the Secretary of State, and the expected date of publication being in the near future, the Commissioner considers that BEIS have struck the appropriate and proportionate public interest balance and at the time of the request that public interest balance supported maintaining section 22(1) to withhold the requested information.

33. Having found the withheld information is exempt from disclosure under section 22(1) of FOIA, the Commissioner has not gone on to consider the Department's application of sections 43(2) and 29(1)(a).

Section 10 – time for compliance

34. Section 1(1) of FOIA states that:

'Any person making a request for information to a public authority is entitled –

(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 that information communicated to him.'

35. Section 10(1) of FOIA requires a public authority to comply with section 1(1) promptly and in any event within 20 working days.
36. In this case the complainant submitted his request on 26 November 2016. BEIS did not provide him with a substantive response to his request until 24 February 2017. The Department's delay in providing the response was a serious breach of section 10(1) of FOIA.

Right of appeal

37. 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: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF