

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 27 March 2014

**Public Authority:** Department for Business Innovation & Skills  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

### **Decision (including any steps ordered)**

---

1. The complainant has requested the names of two companies which were granted export licences for the dual-use substances for six months in 2012 and an explanation as to why these licences were granted. The Department for Business Innovation & Skills (DBIS) provided the complainant with information to explain why the licences were granted but refused to disclose the names of the two companies as it said this information was exempt from disclosure under section 41 and section 43(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that DBIS has correctly applied section 41 FOIA to withhold the names of the two companies in this case.
3. The Commissioner requires no steps to be taken.

### **Request and response**

---

4. On 25 October 2013 the complainant requested information of the following description:

"Apparently two British companies were granted export licences for the dual-use substances for six months in 2012 while Syria's civil war was raging. Potassium fluoride and sodium fluoride can be used in connection with chemical weapons.

1. What are the names of the UK companies involved in this trade?
2. Why were they given licences from the UK business secretary to sell the chemicals in 2012?"

5. On 22 November 2013 DBIS responded. It provided the complainant with the information he requested at part 2 of the request but refused to disclose the information requested at part 1 of the request under section 41 and 43(2) FOIA.
6. The complainant requested an internal review on 29 November 2013. DBIS sent the outcome of its internal review in December 2013. It upheld its original position.

### **Scope of the case**

---

7. The complainant contacted the Commissioner on 2 January 2014 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether DBIS was correct to withhold the names of the two companies relevant to the scope of this request under section 41 or section 43(2) FOIA.

### **Reasons for decision**

---

9. DBIS has applied section 41(1) to withhold the information which confirms the names of the two companies who were granted export licences for the dual-use substances for six months in 2012 while Syria's civil war was ongoing.
10. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

*Was the information obtained from another person?*

11. The names of companies granted the export licences clearly constitutes information sent by a third party (the companies themselves) and the Commissioner therefore accepts the first limb of section 41 is met.

*Would disclosure constitute an actionable breach of confidence?*

12. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

- Whether the information has the necessary quality of confidence;
  - Whether the information was imparted in circumstances importing an obligation of confidence and
  - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.
13. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
  14. The Export Control Organisation (ECO) is responsible for issuing licences for controlling the export of strategic goods and is part of DBIS. The information in this case was received by the ECO in its role as the body responsible for making licencing decisions in this regard.
  15. The Commissioner would therefore accept that the information cannot be said to be publicly available and as such it cannot be considered to be otherwise accessible. DBIS has also argued that the information cannot be said to be trivial as it contains sensitive commercial information such as the fact that companies have been granted export licences for the dual-use substances for six months in 2012 while Syria's civil war was ongoing.
  16. Based on the above the Commissioner agrees that the information is not trivial as it does contain more detailed information than that already provided and links companies to specific export licences which could be considered commercially sensitive information. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.
  17. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence. In support of its position, DBIS has explained to the Commissioner how the information is received and the information that is required in order for a decision on a licence to be made.
  18. DBIS has explained that under the Export Control Act 2002 there is one main order giving the Secretary of State the power to grant licences - the Export Control Order 2008 (SI 2008/3231). This was a consolidation replacing a number of earlier Orders. The Secretary of State also has licensing powers under a range of other legislation, including EU Regulations. An applicant for an export licence has to submit sufficient information to allow the Secretary of State to determine whether or not to grant an export licence. This information will include details of the goods to be exported or technology to be transferred as well as details of the intended end use and final recipient. The Secretary of State (via

the Export Control Organisation - ECO) will be in receipt of a significant amount of information, which is commercially sensitive. Although strictly speaking there is no statutory provision requiring this information to be provided, if it is not it is unlikely that a licence will be issued. As a result there is a long standing understanding across the exporting community that BIS and the other Departments involved in the export licensing process will treat applications for export licences (and related information) as being supplied in confidence (including both the names of the companies applying for an export licence and their names linked to specific licence details). This is accepted by and maintained by the public authorities concerned.

19. It went on to say that although the licence application form itself did not, at the time (2012) contain a "confidentiality statement" it explicitly states the circumstances in which data will be shared, e.g. with other government departments and international organisations (reflecting specific disclosure powers now in art. 43 of the 2008 Order). Companies making licence applications do not expect the information they supply to be disclosed outside this group and otherwise expect it to be treated as confidential.
20. The Commissioner recognises that information provided as part of the licencing application is provided in order to allow the Secretary of State to make a decision on granting export licences and there is an implied obligation of confidence on the part of the ECO that it will not share information provided as part of this process in circumstances other than those set out on the application form.
21. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. The test under section 41 is whether disclosure would constitute a breach of confidence actionable by the person who provided the information or any other person.
22. DBIS has contacted the companies involved to ask if they consented to disclosure or had any objections. The companies registered strong objections to disclosure.
23. The Commissioner has reviewed the submissions from the companies and notes the following objections:
  - Disclosure could result in harm to the company, its employees and facilities and anonymity is important to protecting its employees, they rely on maintaining low profiles as a form of security;
  - Disclosure of information about the equipment to be exported linked to specific companies when that information is of a

sensitive nature would be likely to be prejudicial to companies' commercial interests; and

- The companies emphasised the confidentiality inherent in the commercial arrangements they have with customers, suppliers and investors which would be likely to be prejudiced by disclosure.
24. The Commissioner accepts the argument that if the information were disclosed the commercial interests of the named companies would be compromised, potentially putting them at a competitive disadvantage and damaging their commercial relationships. The Commissioner is also mindful that the majority of the companies have emphasised the importance of anonymity to ensure their security.

*Would a public interest defence be available?*

25. As section 41(1) is an absolute exemption there is no public interest. However, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The duty of confidence public interest test assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.
26. In taking this approach it is important to consider the consequences of disclosing confidential information in order to properly weigh the public interest in preserving the confidence against the public interest in disclosure. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected and not easily overridden.
27. The Commissioner considers there is a public interest argument based around transparency of export licences especially with regard to the export of chemicals. In this case DBIS has released some information about the licences granted in order to satisfy the public interest in this area but strongly maintains its position that linking the information in the public domain with specific companies would not be in the public interest.
28. DBIS has argued that breaching the duty of confidence it has to applicants applying for export licences would be highly likely to have a detrimental impact on the export licencing system. It considers that disclosure of information about export licence applicants supplied in confidence, linked to information about the type of goods and end-user, would compromise the willingness of companies and future applicants

from sharing full details of trade activity because of concerns the information would not remain confidential. DBIS argues that this could lead to companies looking to trade through overseas subsidiaries where the export control system may be different.

29. As a result, DBIS considers this would prejudice the ECOs ability to maintain confidence in the UK's system of export control and would not be in the public interest as it would impact on the ability of the UK to be involved in legitimate business by reducing unlicensed exporting activities.
30. The Commissioner also recognises the wider public interest in preserving the principle of confidentiality. He considers there is a strong public interest in the export licence application process operating effectively and ensuring that exporters who are applying for licences properly cooperate and engage with government departments. The Commissioner accepts that if information provided as part of the application process is disclosed, in this case the identities of two companies, this would undermine DBIS' confidentiality obligations and undermine this process.
31. The Commissioner also acknowledges there is a public interest in avoiding detriment to the commercial interests of the specific companies who applied for licences.
32. Having reviewed the information and the arguments put forward by DBIS, the Commissioner has concluded that there is a strong public interest in maintaining the obligation of confidence. The Commissioner therefore considers the public interest in maintaining the duty of confidence outweighs the public interest in disclosure in this case.
33. In reaching his decision the Commissioner was not minded to accept there was any significant public interest in disclosure which has not already been met by the disclosures already made and the information already in the public domain on export licences and applications. Consequently, as he has recognised the strong public interest argument in maintaining the principle of confidentiality in this case, he is satisfied that a public interest defence could not be established in this case.
34. Therefore the Commissioner finds that the names of the two companies were correctly withheld in this case under section 41 of the FOIA. He has therefore not gone on to consider the application of section 43(2) FOIA any further.

## Right of appeal

---

35. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

36. 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.
37. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**