Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2017

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information about agreements, licences and memorandums of understanding ("MOUs") between the Home Office and the Kingdom of Saudi Arabia ("KSA"). The Home Office disclosed some information about a particular MOU and also certain import/export licences. It withheld the remaining information in connection with the MOU under the exemptions at sections 24(1) (national security) and 27(1)(a) (international relations), and it withheld information about the import/export licenses under section 43(2) (commercial interests) of the FOIA. It also refused to confirm or deny whether it held any other information falling within scope of the request, citing section 27(4)(a) and (b) (international relations) of the FOIA.

2. The Commissioner's decision is that the Home Office was entitled to rely on the exemption at section 27(1)(a) of the FOIA to withhold information about the MOU. It was also entitled to rely on section 27(4) to neither confirm nor deny whether it held further information. However, the Home Office did not apply the section 43(2) exemption correctly. It also breached section 10(1) by failing to comply with section 1(1) within the time for compliance, and section 17(1) by failing to provide a refusal notice within the time for compliance.

3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation:

   - issue a fresh response to part (iv) of the request. The information should either be disclosed or a further refusal notice provided which is compliant with section 17 of the FOIA and which does not rely on section 43(2) of the FOIA.

4. The Home Office must take these steps 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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 10 February 2016 the complainant made five requests for information which the Home Office aggregated and refused to deal with on the grounds that to do so would exceed the costs limit at section 12 of the FOIA.

6. On 9 March 2016 the complainant refined the scope of his request to the following information:

> *"1. How many written agreements, licences, Memorandums of Understanding (MOUs) or Letters of Offer and Acceptance (LOAs) have been entered into between your Department and any Government department or connected body of the Kingdom of Saudi Arabia? For each, please also provide the following information (where available);*
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> *(i) an overview of the content or purpose of the agreement, licence, MOU or LOA;*
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> *(ii) the date (DD/MM/YYYY) and term of the agreement, licence, MOU or LOA;*
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> *(iii) whether or not the agreement, licence, MOU or LOA is currently extant;*
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> *(iv) the parties and prime contractor(s) to the agreement, licence, MOU or LOA;*
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> *(v) whether there are any existing negotiations for future potential agreements, licences, MOUs or LOAs of this nature.*
>
> *(vi) an overview of the content of any such potential agreements, licences, MOUs or LOAs."*

7. The Home Office refused this request on 10 May 2016 under sections 24(1) and 27(1)(a) of the FOIA. It upheld its application of these exemptions at internal review, which it did not complete until January 2017 (the Commissioner has commented on this in the "Other matters" section, below).

Scope of the case

8. The complainant contacted the Commissioner on 2 February 2017 to complain about the way his request for information had been handled. He considered that it should have been possible to disclose at least some information falling within scope of the request, with redactions for sensitive material. He believed that there were strong public interest arguments supporting the disclosure of the requested information.

9. During the course of the Commissioner's investigation, the Home Office revised its position, and disclosed some information to the complainant. It provided him with limited information about an MOU signed in March 2014. It refused to disclose any other information that it held about the MOU, citing section 24(1) and section 27(1)(a) of the FOIA. It also explained that the Home Office issues licenses for the import and export of controlled drugs, in respect of which it answered parts (i) – (vi) of the request. However, it refused to disclose the name of the contractors (requested at (iv)), stating that this information was exempt from disclosure under section 43(2) of the FOIA. It also refused to confirm or deny whether it held any other information falling within scope of the request, citing the exemption at section 27(4)(a) and (b) of the FOIA.

10. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim new exemptions either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.

11. The Commissioner has therefore considered the Home Office's revised position in respect of the request.

Reasons for decision

Section 10 – Time for compliance

12. Section 10(1) of the FOIA requires a public authority to respond to a request for information in accordance with section 1(1) of the FOIA within 20 working days following the receipt of the request.

13. In this case the request was submitted on 9 March 2016 and the Home Office did not provide its response until 10 May 2016, some 41 working days later.

14. This is outside the required 20 working day timeframe and therefore the Commissioner finds that the Home Office has breached section 10(1) of the FOIA.

Section 17(1) – Refusal of request

15. The Commissioner has identified that the Home Office failed to issue a refusal notice within the time for compliance provided for in section 10(1), and on this basis breached the requirement of section 17(1).

Section 43 - Commercial interests

16. Section 43(2) states:

> *"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."*

17. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner's guidance on the application of section 43[1] states:

> *"…a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*

18. During the course of the investigation, the Home Office told the Commissioner that it had identified further information falling within scope of the request, which had not previously been considered and which for the most part could be disclosed:

> *"The information relates to drug licences and was overlooked at the initial stage. In addition I will now add section 43 to withhold the names and details of those contractors involved."*

19. In its revised response to the complainant, dated 30 June 2017, the Home Office disclosed the number of licences issued for the import and export of controlled drugs in 2016, and answered the complainant's questions (i) to (vi) in respect of those licences, collectively. However, in respect of point (iv) of the request it said:

> *"Licences are issued to trading entities in the exporting and importing countries. The names of the contractors involved are withheld under section 43 (commercial interests)" a full explanation of this exemption and the consideration of the public interest can be found at Anenx* [sic] *A to this letter."*

[1] https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

20. At Annex A it stated that contractors expect the Home Office to protect the information they supply as part of the licensing process and that disclosure would reveal information about their commercial activities to rival companies, which would undermine their ability to compete.

21. The Commissioner considers that the requested information, being the names of import/export licence holders, relates to a commercial activity. It follows that those engaged in commercial activities will have commercial interests to protect. For section 43(2) of the FOIA to be engaged, it must be the case that disclosure would result in, or be likely to result in, prejudice to those commercial interests.

22. The Commissioner considers that 'likely to prejudice' means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. 'Would prejudice' places a much stronger evidential burden on the public authority and must be at least more probable than not.

23. In its submission to the Commissioner (which was substantively similar to the explanation it provided to the complainant), the Home Office indicated that it was the contractors whose commercial interests would be affected, and that the probability was that their commercial interests "*would be likely to"* be prejudiced by the disclosure. It stated that contractors:

> *"…expect the Home Office to protect their commercial information that we hold as part of the licensing process. To disclose this would reveal details of their commercial activity to other companies and this would undermine their commercial activity. It could have a detrimental impact on commercial revenue and potentially damage its ability to obtain supplies or secure finance. It could also weaken the company position in a competitive environment by revealing market sensitive information or information that would be of use to competitors."*

24. The Commissioner has therefore considered how any prejudice to commercial interests would be likely to be caused by the disclosure of the withheld information (ie the names of contractors). This includes consideration as to whether the prejudice claimed is "real, actual or of substance" and whether there is a causal link between disclosure and the prejudice occurring.

25. When claiming that disclosure would be likely to prejudice the commercial interests of a third party, a public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect; the prejudice must be based on evidence provided by the third party, whether during the time for compliance with a specific request or as a

result of prior consultation. This approach has been confirmed by the Information Tribunal[2].

26. In this case, the Home Office has not supplied evidence that the view it has expressed is based on views obtained from even just a sample of the contractors. It has instead submitted arguments on their behalf as to why they would not want their names disclosing, centring on a presumed reasonable expectation of confidentiality it believes that contractors will have, by virtue of the following clause on licence application forms:

> *"We do not share your personal or company details with other licensees or members of the public and treat information contained within the application form as commercial in confidence but individuals and companies should be aware that we may be required to disclose some information in accordance with the legislation referred to above."*

27. The Commissioner states in her guidance on commercial interests that confidentiality clauses do not shield public authorities from their statutory obligations under the FOIA (and she notes that the wording of the above clause seems to recognise that), and that such clauses are not a substitute for consultation with third parties as to their views on disclosure.

28. Furthermore, the Commissioner's guidance on 'The Prejudice Test'[3] states:

> "*If an authority claims that prejudice would be likely to occur they need to establish that*
>
> - *there is a plausible causal link between the disclosure of the information in question and the argued prejudice; and*
> - *there is a real possibility that the circumstances giving rise to prejudice would occur, ie the causal link must not be purely hypothetical; and*
> - *the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote."*

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[2] Derry City Council v Information Commissioner (EA/2006/0014)

[3] https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf paragraph 33

29. The Commissioner does not consider that the explanations given by the Home Office sufficiently demonstrate a causal link between the disclosure of the withheld information and prejudice to commercial interests. It has not been sufficiently explained why disclosing the names of contractors would be likely to cause the prejudice the Home Office has briefly outlined.

30. The Commissioner does not consider that the Home Office has linked the alleged consequences to the specific circumstances of the case and does not consider that the arguments presented are sufficiently detailed to demonstrate the adverse effect it has predicted. She considers that it is for public authorities to fully explain the relevant causes and effects. The Home Office has asserted that prejudice would be likely to occur as a result of the disclosure of "*market sensitive*" information without clearly explaining why being identified as a licence holder (which the Home Office said in its revised response would only have been live for between two and three months during 2016, and so would by the time of its revised response, have expired) is considered to be market sensitive information or why it would be likely to "*damage* [a contractor's] *ability to obtain supplies or secure finance"*.

31. The Commissioner considers that the Home Office has been given sufficient opportunity to provide evidence and arguments in support of its position with regard to section 43(2) of the FOIA. When making enquiries in this case, the Commissioner informed the Home Office that she gives a public authority one opportunity to justify its position to her before issuing a decision notice, and she also extended the time for responding by six weeks to enable it to provide a more detailed assessment of its handling of the request.

32. In cases where a public authority has failed to provide sufficient evidence to demonstrate that exemptions are engaged, the Commissioner is not obliged to generate arguments on that public authority's behalf or to provide the causal link. The lack of sufficient evidence and cogent arguments from the Home Office has led the Commissioner to the conclusion that section 43(2) of the FOIA is not correctly engaged in this case.

Section 27(1)(a) – International relations

33. In its revised response, the Home Office referred the complainant to information on the GOV.UK website[4] about an MOU signed in March 2014. It refused to disclose any more information about that MOU, citing section 27(1)(a) of the FOIA.

34. Section 27(1)(a) provides:

> *"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice*
>
> *(a) relations between the United Kingdom and any other State".*

35. The Commissioner has previously considered a complaint about the Home Office's application of section 27(1)(a) in relation to a request for information about this MOU from another complainant. The decision in that case was issued on 22 August 2016, under reference FS50634391[5]. The Commissioner notes that in its correspondence with the complainant, the Home Office drew his attention to that decision.

36. The reasons for the decision in that case are clearly set out in that decision notice and the Commissioner does not consider it necessary to reproduce them here. The Home Office is relying on substantially similar arguments here, to those put forward in that earlier case (in respect of the engagement of the exemption, that prejudice "would" occur and the balance of the public interest), and the decision has not subsequently been varied as a result of any appeal to the First-tier Tribunal. The background circumstances to the relationship between the UK and the KSA governments have remained essentially unchanged in the intervening eleven months since that decision was issued.

37. Having considered the arguments put forward by the complainant and the Home Office, and having particular regard to the decision in respect of the request for the same information in FS50634391, the Commissioner is satisfied that disclosure of the withheld information represents a significant and real risk to the UK's relations with the KSA. In her view, it is clear that disclosure in this case would damage the UK-KSA relationship on the matters covered in the withheld information,

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[4] https://www.gov.uk/government/publications/saudi-arabia-country-of-concern--2/saudi-arabia-country-of-concern

[5] https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624890/fs50634391.pdf

and has the potential to harm the relationship between the two nations across a range of issues. She is satisfied that the public interest favours maintaining the exemption. Her reasoning for her decision is as set out in the decision notice issued under FS50634391.

38. Because the Commissioner is satisfied that section 27(1)(a) of the FOIA applies to the MOU in its entirety, it has not been necessary for her to go on to consider whether section 24(1) also applies.

Section 27(4) – International relations (neither confirm nor deny)

39. The Home Office acknowledged holding information about the import/export licence agreements described above, and the MOU signed in March 2014. It would neither confirm nor deny whether that information represented all the information it held which fell within the scope of the request, citing the exemption at section 27(4) of the FOIA.

40. Section 27(4) provides:

> *"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) –*
>
> *(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or*
>
> *(b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court".*

41. The issue for the Commissioner to consider is, therefore, whether confirming or denying that the requested information is held would, or would be likely to, prejudice relations between the United Kingdom and any other State or would involve the disclosure of confidential information received from a State, international organisation or international court.

42. The Home Office relied on the submissions it had made with regard to section 27(1) of the FOIA, although it considered that the lower threshold of "*would be likely to*" prejudice would apply. It stated that providing information as to the nature or extent of the relationship between the UK and the KSA would be likely to prejudice and undermine that relationship. The Home Office said that KSA is an important strategic partner to the UK. It is the political lead in the Gulf Region and one of the UK's most important partners in tackling security and terrorist threats to both the UK and other countries. There is a strong expectation, and presumption, of confidentiality with regard to the precise details of the relationship between the two countries. Confirming or denying whether further information is held would be likely to

undermine KSA's confidence in the UK's ability to maintain confidentiality in its dealings with the KSA. It is also likely that international confidence in the UK's ability to maintain confidentiality with regard to sensitive relationships more widely would be similarly undermined. The likely effect of this would be States feeling more cautious about liaising freely and frankly with the UK in the future and thus to a reduction in the level or quality of international cooperation with the UK government.

43. Taking all the above into account, the Commissioner is satisfied that to confirm or deny whether other information is held would be likely to prejudice the matters identified at section 27(1)(a) and (b) and therefore that the exemption is engaged. She has gone on to consider the public interest.

Public interest test

44. The Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds more information.

45. The Home Office applied section 27(4)(a) and (b) of the FOIA during the Commissioner's investigation, and so the complainant had not commented specifically on it when submitting his complaint. However, the Commissioner has had regard to his comments about the importance of the Home Office being transparent in its dealings with the KSA.

46. The Home Office recognised that confirming or denying whether more information is held would facilitate public understanding of the nature and extent of the UK's relationship with the KSA and that this would help inform public debate on that subject.

47. Confirmation or denial would also serve the general principles of open government and public accountability, allowing the Home Office to demonstrate appropriate levels of transparency with regard to dealings on sensitive subjects.

48. In favour of issuing a neither confirm nor deny response, the Home Office referred to the need to maintain confidentiality in its dealings with the KSA. To confirm or deny whether any further MOUs, licences or agreements exist between the UK and the KSA would be likely to prejudice or undermine international relations between the UK and the KSA. Confirming or denying that more information exists would hinder and undermine the partnership approach between the two countries and this would prejudice the interests of the UK abroad, and the promotion or protection by the UK of its interests abroad. The Home Office also explained that it would be likely to damage relations between the UK

and other States with which the UK has similar arrangements, if the UK was perceived to pose a risk of disclosing under FOIA information which had been supplied to it in confidence.

49. The Commissioner accepts that there is a public interest in confirming or denying whether other information is held, to assist the public to understand the nature and extent of the UK's relationship with the KSA. She recognises that this relationship is of genuine interest to the public.

50. However, she finds that there is a stronger public interest in not prejudicing relations between the UK and the KSA, which she accepts would be undermined by confirming or denying whether such information is held. In the Commissioner's view, it is strongly in the public interest that the UK maintains good international relations. Her view is that it would not be in the public interest if there were to be a negative impact on the effective conduct of international relations as a result of issuing confirmation or denial in this case.

51. Furthermore, the Commissioner also considers that confirming or denying whether the Home Office holds more information would impact on the UK's relations with other States, not identified in the request. She considers that it may lead these States to feel less able to liaise freely and frankly with the UK whenever necessary in the future, because of concerns about onward disclosure under the FOIA. The relevant considerations in reaching a judgement on the balance of the public interest therefore extend beyond the actual content of any information which may or may not be held.

52. Since the Commissioner considers that the public interest in issuing a neither confirm nor deny response outweighs that in confirming or denying whether or not further information is held, she is satisfied that the Home Office was entitled to issue such a response under section 27(4)(a) and (b) of the FOIA.

Other matters

Section 45 - internal review

53. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one the code of practice established under section 45 of the FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.

54. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or no more than 40 days in exceptional circumstances.

55. The complainant asked for an internal review of the outcome on 26 May 2016. The Home Office did not provide the results of its review until 9 January 2017, more than seven months later.

56. The Home Office has not offered an explanation for the delay, and the Commissioner notes that the review did not result in any change to its position in respect of the request. Although she acknowledges the sensitivities of this case, the Commissioner considers that the period of more than seven months to conduct the internal review was excessive and not in accordance with the section 45 code.

57. The Commissioner has made a separate record of the failure by the Home Office to respond to the complainant's request within the statutory timescale. This issue may be revisited should evidence from other cases suggest that this is necessary.

Right of appeal

58. 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

59. 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.

60. 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 ……

Samantha Bracegirdle
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