

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

### **Decision notice**

**Date:** 12 July 2018

**Public Authority:** Department for Business, Energy  
& Industrial Strategy

**Address:** 1 Victoria Street  
London  
SW1H 0ET

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

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1. The complainant has requested copies of correspondence between Department for Business, Energy & Industrial Strategy (BEIS) and Toyota regarding the company's investment in its Burnaston car plant in Derbyshire, which was announced on 16 March 2017. BEIS originally withheld the three documents within scope of the request under sections 35 (formulation or development of government policy), 41 (information provided in confidence) and 43(2)(prejudice to commercial interests) of the FOIA and latterly applied section 29(1)(a)(prejudice to the economic interests of the United Kingdom or of any part of the United Kingdom). BEIS provided the complainant with one of the three documents, (a redacted copy of an email exchange) at internal review and advised the Commissioner during her investigation that they did not consider that section 35 applied to the two remaining withheld documents. The Commissioner's decision is that BEIS correctly withheld the remaining two documents under section 43(2) 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.

## Request and response

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2. On 6 April 2017, the complainant wrote to BEIS and requested information in the following terms:  
  
*'Please provide a copy of correspondence from July 14<sup>th</sup> until the present day involving Greg Clark, Nick Hurd, Jacob Willmer or any official from the BEIS Automotive policy team such as Sabine Mosner, with Toyota, regarding the firm's 240 million pounds investment in its Burnaston car plant in Derbyshire, which was announced on March 16<sup>th</sup>'.*
3. The Department wrote to the complainant on 9 May 2017 and advised him that sections 43(2), 41 and 35(1)(a) of the FOIA applied to the information requested and that they needed additional time to consider the public interest test. They advised that they hoped to provide a substantive response to the request by 7 June 2017.
4. BEIS provided the complainant with their substantive response to his request on 7 June 2017. The Department informed him that three documents held were within scope of his request, these being a letter, a confidential company briefing and an email exchange. BEIS confirmed that all three documents were being withheld under sections 35(1)(a), 41 and 43(2).
5. The complainant requested an internal review on 7 June 2017 and the Department provided him with the same on 6 July 2017. The review took account of the fact that information on a particular Ministerial meeting referred to in the withheld email exchange had since been published as part of the Department's transparency data. Therefore, in respect of the withheld email exchange, the review found that the balance of the public interest lay in favour of disclosure and the Department disclosed this document to the complainant (with appropriate redactions for third party personal data which the complainant has accepted). The review confirmed that the remaining two documents (letter and confidential company briefing) were exempt from disclosure in their entirety under the specified exemptions.

## Scope of the case

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6. The complainant contacted the Commissioner on 20 July 2017 to complain about the way his request for information had been handled. The complainant contended that the withheld information was not commercially sensitive and that the public interest supported disclosing the same.

7. During the course of the Commissioner's investigation BEIS advised that they were no longer applying section 35(1)(a) to the residual withheld information but in addition to sections 43(2) and 41, they advised that they were applying section 29(1)(a) to the information.
8. The Commissioner has had sight of the withheld information in this case, which is a letter dated 13 March 2017 from the Secretary of State for Business, Energy & Industrial Strategy, Mr Greg Clark MP to the Chief Executive Officer of Toyota Motor Europe NV/SA, Dr Johan Van Zyl and a confidential company briefing provided to the Department by Toyota.
9. In submissions to the Commissioner, the complainant contended that the refusal by BEIS to disclose the two withheld documents interfered with his Article 10 Right to Freedom of Expression under the Human Rights Act 1998.
10. The Commissioner previously addressed the contention that the decision in Magyar Helsinki Bizottsag v Hungary (Application No. 18030/11) impacts the FOIA regime in FS50668114 (August 2017). The Commissioner considers that the decision of the Supreme Court in Kennedy v Charity Commission [2014] UKSC 20 is a complete answer. The Commissioner is mindful that the majority of the Supreme Court held that there was no Article 10 ECHR right of access to state-held information. She considers that that conclusion is binding on inferior courts and tribunals notwithstanding any subsequent decision from the European Court of Human Rights.
11. Furthermore, the Commissioner notes that, even if Kennedy were not a complete answer for that reason, the majority of the Supreme Court further held that if there was an Article 10 ECHR right of access to state-held information, that right was not enforceable through the FOIA by virtue of the relevant exemption (section 32 in that case) read with section 78 of the FOIA. The majority found that the proper route of challenge would be a judicial review to seek disclosure of the information in the ordinary courts. The Commissioner notes that this reasoning was applied by the First Tier Tribunal in Moss v IC EA/2016/0250.
12. Therefore the scope of the Commissioner's investigation has been to determine whether BEIS correctly withheld the residual withheld information (two documents noted above) under the exemptions applied.

## **Reasons for decision**

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13. Section 43(2) of the FOIA states that information is exempt information if its disclosure under the legislation would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). A commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services.
14. In order for a prejudice based exemption such as section 43(2) 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 withheld information was disclosed 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 potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect against. 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 disclosure '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 to discharge.
15. In their substantive request response of 7 June 2017, BEIS advised that the documents in scope of the request contained commercially sensitive information and that disclosure of the information would be likely to prejudice the commercial interests of Toyota. In the subsequent internal review the Department stated that the requested information '*contains what is clearly commercially sensitive information*' which if released, would be of commercial value to Toyota's competitors. BEIS stated that the information had been provided strictly on the basis that its availability would be tightly restricted even within the Department.
16. In submissions to the Commissioner BEIS explained that the exchanges with Toyota are part of a confidential discussion between HMG and the company about their investment plans, in significant part directly or indirectly engaging with Toyota's HQ in Japan. The Department advised that although at the time that the complainant submitted his request,

the investment by Toyota in the Burnaston plant had been announced, lower level decision making was ongoing, and that remained the case at the time of the Commissioner's investigation<sup>1</sup>. BEIS confirmed that the quantum of any Government support had not been finally determined or settled, as the due diligence process was continuing.

17. BEIS confirmed that they had sought the views of Toyota on whether and how disclosure of the requested information would impact on their commercial interests. The Department confirmed that Toyota was clear about the commercial sensitivities of the information and their concern about being able to have trusting and private conversations and correspondence with the Department. BEIS confirmed that these conversations were verbal only but were reflected in subsequent email exchanges.
18. BEIS noted the clear views from Toyota on the extent of commercial sensitivity of the withheld information. The Department advised the Commissioner that the automotive sector is highly competitive and the key drivers for competitive success include the model, production and investment considerations which were at the heart of the Toyota investment decision. BEIS stated that the relevant commercial interest factors covered a wide range of issues, for example: quantum of investment (which allows competitors and suppliers to draw inferences); decision lines (precise timing of roll-out of new models is directly linked to pricing and profitability); and internal competitiveness (and by implication, margins).
19. The Department provided the Commissioner with confidential submissions as to the commercial sensitivity of the two documents concerned. The Commissioner is not able to divulge that part of the Department's submissions in this notice as that would risk revealing the withheld information and causing the prejudice which section 43(2) has been applied to prevent. This confidential information is therefore contained in a Confidential Annex.
20. BEIS stated that they considered that it was clear that the withheld information was commercially sensitive and that disclosure of the information *would* prejudice Toyota's commercial interests. In particular, it could provide insights to other car manufacturers advantageous to their ability to compete, and to suppliers in their pricing negotiations.

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<sup>1</sup> The Commissioner notes that on 28 February 2018 Toyota announced that it would be building the next generation of its Auris hatchback at its Burnaston plant – <https://www.bbc.co.uk/news/business-43226097>

21. In submissions to the Commissioner, the complainant contended that the withheld information was not commercially sensitive. He stated that:

*'Companies do not release the most commercially sensitive information to government, partly because they know that ministers and the decisions they make are subject to high levels of public scrutiny and that ministers change roles and positions regularly, for example'.*

22. The complainant continued:

*'Neither Toyota, the business department nor the emails released suggest there has been a 'sweetheart deal' so Toyota cannot have provided detailed financial information, for example, to seek any compensation for tariffs or tax barriers. So without such an agreement and such data, the letter and briefing cannot contain 'highly commercially sensitive' information. If there are one or two elements, they could be redacted but the main document published'.*

23. Furthermore, the complainant stated that, *'Toyota has said on the record that it has yet to decide which models to build at Burnaston in the next decade, so the documents will not contain information about specific cars for example and thus the investment relates just to the car platform which Toyota has already rolled out elsewhere internationally, meaning that such details are not sensitive'.*

24. The complainant noted that in response to a separate information request to the Foreign & Commonwealth Office (FCO) for correspondence and documentation mentioning Toyota (and/or Nissan) in relation to the Foreign Secretary's visit to Japan in July 2017, he had been provided with some information, including background information to a briefing for a breakfast hosted by the British Chamber of Commerce and the British Market Council on 21 July. This included reference to Toyota having *'made machinery investments in Burnaston ahead of model decisions this year'*. The complainant highlighted this specific information as an example *'of the government being able to provide details which would be deemed sensitive and commercially sensitive'*. However, since the FCO did not redact this information under section 43(2) they apparently did not consider it to be commercially sensitive. The Commissioner would note that the reference is non-specific and whilst commercial in nature (in terms of Toyota's business strategy) could not be considered to be commercially sensitive so as to attract the exemption.

25. Contrary to what the complainant has contended, the Commissioner recognises that companies often share/divulge commercially sensitive information with BEIS (and other government departments), and do so on the understanding and expectation that such information will be

treated as confidential by the Department, using the relevant FOIA exemption(s). Having not had sight of the withheld information the complainant is inevitably restricted to speculating about its content. However, having had sight of the information, and the confidential submissions provided by BEIS, the Commissioner is satisfied that the information, particularly the confidential company briefing, is commercially sensitive, and that there is a causal relationship between disclosure and the prejudicial outcome for Toyota that the Department has described.

26. The information, particularly the confidential company briefing, could provide insights and information to other car manufacturers advantageous to their ability to compete, and to suppliers in their pricing negotiations. Given the content of the withheld information and the competitive nature of the car manufacturing industry, the Commissioner considers that the risk of such prejudice occurring is very high, such that disclosure of the information *would* prejudice Toyota's commercial interests.
27. In light of the above, the Commissioner is satisfied, therefore, that section 43(2) is engaged with respect to the information which remains withheld.

### **Public interest test**

28. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
29. In his request for an internal review, the complainant stated that, *'stakeholders are aware of freedom of information legislation and aware that ministers are accountable to the public and are regularly questioned about their dealings with businesses and other interested parties'*. He stated that, *'Toyota, like other listed companies, must disclose commercially sensitive information to shareholders as part of a formal reporting process so there is an obligation for relevant stakeholders to be aware of any commercially sensitive matters which can affect the company's performance'*.
30. The complainant contended that, *'it is in the public interest to know what kind of requests are being made of the British government by companies as they could incur a cost to the public purse or potentially break rules and regulations, regardless of whether the government intends to meet such demands or not'*. He stated that ministers had already commented *'extensively in public'* about what firms were seeking from the government in terms of market access, trade, tariffs and barriers around Brexit.

31. In submissions to the Commissioner the complainant noted that the meetings which Greg Clark and Nick Hurd (then Minister of State for Industry and Climate Change) held with Toyota are in the public domain, since they are listed in the government's log of ministerial meetings. The complainant stated that Mr Clark's visit to Tokyo to meet Toyota executives was also in the public domain and Toyota had publicly discussed upcoming investment decisions and whether it could delay such a step. The complainant therefore contended that, *'both of these elements mean that the nature of the discussions and the fact that they were underway were both in the public domain from last year, so the level of confidentiality is not as BEIS has described it and the information should be released'*.
32. The complainant noted that the email exchange disclosed by the Department *'show that Toyota's Europe President and Chief Executive. Johan van Zyl was worried about future trade arrangements and had been reassured by the Secretary of State, Greg Clark'*. The Commissioner notes that it was stated in the email that, *'Dr Zyl noted that uncertainties over future trade arrangements are a worry, and SoS sought to reassure on the alignment of company and HMG goals'*. The complainant has contended that the public *'has the right to know the details of the reassurances from Clark'*.
33. In submissions to the Commissioner the complainant further stated that the disclosed email showed that Toyota delayed its investment decision and that it was worried about Brexit. He cited a September 2017 Reuters interview with Toyota<sup>2</sup>, in which the company's Executive Vice President Didier Leroy stated that, *"A few months ago the UK government was saying "We're sure we'll be able to negotiate (a deal) without any trade tax". They are not saying that any more"*. The complainant contended that the withheld information *'would simply add detail to the publicly stated information and the details released in the redacted emails'*.
34. In submissions to the Commissioner, BEIS confirmed that they had considered the public interest in relation to the two documents. They considered that the factors in favour of disclosure of the information included the public interest in open and transparent administration and in understanding how Government engages with companies to secure significant investments, including the use of public money, or any influence on developing policies.

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<sup>2</sup> <https://uk.reuters.com/article/uk-autoshow-frankfurt-toyota-eu/toyota-says-brexit-talks-drift-could-threaten-uk-production-idUKKCN1BN24R>



35. The Department stated that:

*'While this is always a matter of significant public interest, we recognise, in particular, the substantial additional importance of this subject in the context of the exit of the UK from the European Union, the UK's trade relationship with the EU after exit, and the consequences of these changes for major car manufacturers, which form such an important part of the UK economy'.*

36. Given the major consequences for UK jobs and manufacturing, the Department recognised that there is *'a weighty public interest in understanding government policy in this area and in understanding how Government engages with companies, such as Toyota, at this time'.*

37. The Department explained that this is why both the Toyota and Government press releases at the time of the investment announcement made available to the public a significant amount of information, including the nature and potential quantum of Government support and the nature of the key investment, ie, the installation of Toyota's production platform. Therefore, the fact that the level of potential Government support had been made public was a factor which BEIS took account of in their assessment of the public interest test.

38. Despite the weighty public interest noted above, in their substantive response of 7 June 2017, BEIS contended that *'there is a stronger public interest in withholding the information to ensure that the commercial interests of external companies are not damaged or undermined by disclosure of information which is not common knowledge and which could adversely impact current or future business'.*

39. The Department stated that it was important that companies and government are able to have discussions relating to commercially sensitive information as this can play a key role in the Government formulating policy and understanding the challenges faced by companies as well as considering how to respond to those challenges and to promote positive economic outcomes. For such information to be shared, the Department contended that companies like Toyota *'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 they do not suffer unnecessary damage to their wider commercial interests and opportunities'.*

40. In submissions to the Commissioner, BEIS stated that whilst the nature of Government relationships and the culture of companies varies, Government's ability to influence in all cases depends on being seen to be a trusted interlocutor in relation to extremely sensitive material and emerging thinking. The Department stated that in the case of Toyota, investment decisions are made at its headquarters in Japan, and *'senior*

*management overseas place high premium on relationships built on mutual trust and on the ability for those in the company, at all levels, to share sensitive information and have open discussions without the fear that such information will be made public'. BEIS stated that, 'maintaining this trust is a major factor in being able to engage at an early stage of corporate decision making and to be able to influence and encourage new investments within the Toyota group to be made in the UK, rather than learning only after decisions have been made that these have favoured an overseas location'.*

41. The Department contended that *'the release of Toyota's information without their authorisation could impact on our future interaction not just with Toyota, but with other major car manufacturers who will be concerned about what the release means as to their own ability to discuss commercially sensitive matters with the UK Government'*.
42. Therefore, BEIS considered that the public interest in withholding the specific information outweighed the public interest in disclosure of the same.
43. The Commissioner recognises that there is a strong and legitimate public interest in transparency and accountability of whatever assurances Government may have given to Toyota to enable the company to make their Burnaston investment decision. The nature and detail of any such assurances provided to Toyota are also of public interest importance because Government may well be asked or required to provide further such assurances to other companies in the wake of Brexit.
44. The Commissioner recognises, as the complainant highlighted in his submissions, that a number of MPs, including the chairs of the Treasury Select Committee and the Business, Energy and Industrial Strategy Select Committee, Nicky Morgan MP and Rachel Reeves MP, respectively, have called for the Government's letters to Toyota (and Nissan) to be published and/or for the Government to reveal what private reassurances it may have offered Toyota over Brexit.
45. However, the Commissioner considers that a central consideration of the public interest test as applied to section 43(2) is the timing of the request and the circumstances prevailing at the time. Toyota's investment in its Burnaston plant was announced on 16 March 2017, with the complainant's request being made less than one month later (6 April 2017). As BEIS have confirmed, although the investment announcement had been made at the time of the request, lower level and commercially sensitive decision making remained ongoing, with the quantum of Government support not having been finally determined.
46. The Commissioner does not consider that the confidential company brief carries a strong public interest in disclosure, since it concerns the

internal commercial decisions of Toyota and whilst it may have informed the details of the company's discussions and correspondence with Government, it would not disclose what these were.

47. The Commissioner considers that the information contained in the Secretary of State's letter to Toyota carries a stronger and significant public interest in transparency and accountability, since it would provide a greater degree of insight and understanding into the Government's discussions and correspondence with Toyota in relation to their investment plans in the UK. However, the Commissioner recognises and is mindful that the Department has already published (via their press releases) some information (including the potential quantum of Government support) about their dealings with Toyota into the public domain.
48. This was implicitly acknowledged by the complainant in his submissions to the Commissioner when he stated that the disclosure of the withheld information *'would simply add detail to the publicly stated information and the details released in the redacted emails'*. That is to say, some measure of transparency has already been met through the Department's proactive publications (and indeed the press releases of Toyota).
49. The Commissioner would also note that the Secretary of State's appearance before the BEIS Select Committee on 14 December 2016 (when he was questioned about the Government's discussions and correspondence with Nissan) gives some indication of the nature of the assurances provided to Toyota and other companies. The Secretary of State stated that, *'What I would say to Nissan **and would say to any company** (Commissioner's emboldening) is that I understand and we understand the importance, as part of our negotiation, to look and secure the continued access, tariff-free, to the single market and to avoid the kind of bureaucratic impediments that will disrupt trade'*. There is clearly an important difference between the non-commercially sensitive information disclosed by Government and Toyota publicly and the withheld information, which is commercially sensitive and confidential. That is to say, disclosure of the latter information would not *'simply add detail'* to the information already disclosed without any adverse consequences or ramifications.
50. In FS50662630, which involved similar information and considerations to the present case (the company in that case being Nissan), the Commissioner agreed with the complainant that there is an important public interest in knowing what financial commitments had been given to Nissan by the Government, but that transparency and accountability would apply to the finalised actual figures (which may or may not differ from those announced). In paragraph 30 of the aforementioned decision, the Commissioner stated that:

*'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'.*

51. The Commissioner considers that the same careful and proportionate balance must be struck in the present case, and that if BEIS were to disclose the withheld information, at a time when the information remains commercially sensitive and confidential to Toyota, then this would inevitably adversely impact not only Toyota's own commercial interests, but more importantly, from a public interest perspective, would undermine and damage the Government's engagement with the company, and thus jeopardise UK jobs and investment.
52. Any short-term specific public interest benefits in transparency which disclosure of the Secretary of State's letter to Toyota would bring (important and legitimate though such benefits are) are outweighed by the wider public interest in ensuring that companies such as Toyota have the confidence and security of sharing and providing commercially sensitive information with the Department. This enables Government to engage effectively and productively with such companies on as informed a basis as possible, with a view to maximising investment in the UK and protecting jobs, which is the stronger long-term public interest, particularly in an uncertain post-Brexit landscape.
53. The Commissioner is therefore satisfied that the public interest in disclosure of the withheld information is outweighed by the public interest in withholding the information.
54. The complainant has contended that it would be possible to supply him with the withheld information with redactions being made for *'any very specific sections which contain genuinely commercial sensitive information, as government departments do as a matter of course with freedom of information requests'*. The complainant considers that this would be a more proportionate response than withholding the information in its entirety. The Commissioner would note that the complainant therefore does appear to accept that BEIS (and other government departments) may hold information which is commercially sensitive to companies or other third parties.

55. The Commissioner is satisfied that the confidential company briefing document is commercially sensitive in its entirety. With respect to the letter, the Commissioner recognises that this letter was provided to Toyota within the context of a confidential and commercially sensitive ongoing discussion between the company and HMG about Toyota's investment plans (the letter is marked as 'Commercial-in-Confidence'). The Commissioner will always encourage a redacted disclosure approach where possible and appropriate. However, she does not consider that this would have been appropriate in this instance.
  
56. Having found that the withheld information is exempt from disclosure under section 43(2) of FOIA, the Commissioner has not gone on to consider the Department's application of the other exemptions applied.

## Right of appeal

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57. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

58. 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.
59. 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  
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Information Commissioner's Office  
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Wilmslow  
Cheshire  
SK9 5AF**