

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 November 2022

Public Authority: Department for International Trade
Address: Old Admiralty Building
Admiralty Place
London
SW1A 2DY

Decision (including any steps ordered)

1. The complainant submitted a two part request to the Department for International Trade (DIT). This first part sought information about a particular senior civil servant's involvement with the export of certain products by a UK arms manufacturer. The second part sought records concerning a specific licence application made by that manufacturer. DIT responded by stating that it did not hold any information falling within the first part of the request. In relation to the second part of the request it disclosed some information but withheld further information on the basis of sections 36(2)(b)(i) and (ii) (effective conduct of public affairs), 40(2) (personal data), 41(1) (information provided in confidence) and 43(2) (commercial interests) of FOIA. The complainant argued that DIT would be likely to hold information falling within the first part of the request and challenged its decision to withhold information falling the second part of the request.
2. The Commissioner's decision is that on the balance of probabilities DIT does not hold information falling within the first part of the request. In relation to the second part of the request the Commissioner's decision is that the withheld information is exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) and 41(1) of FOIA.
3. No steps are required.

Request and response

4. The complainant submitted the following request to DIT on 14 February 2021:

'I am seeking records in concerning Sir Richard Paniguan and the UKTI DSO licencing of arms exports to Turkey by EDO MBM Technology Ltd, Brighton.

Specifically please provide

1. Any records held by your department from the period 2013-2015 involving Sir Richard Paniguan related to the export of Hornet bomb racks/missile launchers by EDO MBM Technology Ltd, Brighton to Roketsan in Turkey.

and

2. Any records held by your department from the period 2013-2015 concerning the Standard Individual Export Licence (SIEL) application made by EDO MBM Technology Ltd, Brighton to export Hornet bomb rack/missile launcher to Roketsan in Turkey

Application number: ?

Application date 19/02/14

Completion date 9/04/14

Rating: ML4.b.1.

Item: Equipment for launching/handling/ controlling munitions Hornet Bomb Rack/Missile Launcher .

Value £32,650.00'

5. DIT responded on 15 March 2021. It explained that it did not hold any information falling within the scope of part 1 of the request. In relation to part 2 of the request it provided the complainant with the information it considered to be disclosable under FOIA. However, it explained that it was withholding further information on the basis of the exemptions contained at the following sections of FOIA: 36(2)(b)(i) and (ii) (effective conduct of public affairs), 40(2) (personal data), 41(1) (information provided in confidence) and 43(2) (commercial interests).
6. The complainant contacted DIT on 17 April 2021 and asked it to conduct an internal review of its response. He argued that DIT was likely to hold information falling within part 1 of his request and challenged DIT's reliance on the exemptions cited to withhold information falling within the part 2 of the request.

7. DIT informed him of the outcome of the internal review on 26 May 2021. It explained that it could not locate any information falling within the scope of part 1 of the request. In relation to part 2 of the request it remained of the view that the exemptions cited in the refusal notice applied.

Scope of the case

8. The complainant contacted the Commissioner on 14 July 2021 to complain about the way his request for information had been handled. More specifically he argued that in relation to part 1 of the request he considered it likely that DIT would hold relevant information. In relation to part 2 of the request he disputed DIT's reliance on all of the exemptions cited with the exception of section 40(2).

Reasons for decision

Part 1 of the request

9. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
10. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
11. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, and/or other explanations offered as to why the information is not held.

The complainant's position

12. The complainant noted that Sir Richard Paniguan was head of UKTI DSO reporting to the Ministry of Defence at the time when this licence application was made by EDO MBM Technology Ltd in 2014. The complainant also noted that Sir Richard was previously BP's Vice President of the Middle East working closely with the UK government on its policy toward the region. The complainant argued that it was hard to accept that Sir Richard would not have had some involvement in the decision to approve this important export licence.
13. In relation to the importance of the licence, the complainant stated in his request for an internal review that 'The export licence is for a sensitive and critical component - the Hornet bomb rack - that enabled

Turkey to circumvent a US congressional ban on supplies of armed UAV technology to Turkey and develop its own armed UAV industry with the arming of the Bayraktar TB2, the Vestel Karayel, and the Turkish Aerospace Industries ANKA-S.'

DIT's position

14. DIT provided the Commissioner with the following contextual background regarding Defence and Security Organisation (DSO) now UK Defence and Security Exports (UKDSE). DIT explained that between 2008 and 2016 UK DSE was known as UKTI DSO and was part of the Business Department (BERR then BEIS). It became DIT DSO when the Department for International Trade was formed in July 2016. In July 2020 it was rebranded as UKDSE.
15. DIT also provided the Commissioner with details of the searches it had taken to locate relevant information, its records management policy in respect of relevant information, and the hypothetical expectations if the information were to have existed.
16. DIT explained that as part of its searches it assessed the following:
 - A catalogue listing of DIT records migrated from BEIS into DIT SharePoint. Using keyword searches: 'DSO' AND 'EDO MBM', 'EDO MBM' AND 'Turkey' 'Richard Paniguan.' No relevant results were returned.
 - DIT staff, who worked in UKDSE (then DSO) during the period in question, undertook searches of both the live SharePoint sites and legacy/archived areas which includes both records of 'Alfresco' (the successor to the Matrix system) and the Matrix records system. These searches did not locate any files that were considered to contain information within scope of the request.
 - A UKDSE catalogue of all the file titles of UKTI DSO files opened electronically and in paper form under the Matrix system between 2008 and early 2014 when replaced by an upgraded system. No relevant results were returned.
 - Searches were conducted of a Classified Document Register (Department for Trade & Industry (DTI) version) used by UKTI DSO/DIT DSO Secretariat between 2010 and 2017. DIT explained that this is a list of records held as paper due to the sensitivity and classification of the material. It records who received the documents, whether they were filed or whether they were returned or sent on to a third party (such as an archive) or whether they were destroyed. No information within scope of the request was located.

17. DIT looked at DIT Datahub records (these include records transferred from the previous UKTI CRM system) held on EDO MBM Technology and found no records of interactions between UKTI DSO and the company recorded for the period under scope. Datahub is DIT's central system for managing, tracking, understanding, and building relationships with UK International Businesses.
18. With regard to its recorded management policy, DIT explained that the standard retention policy for material of this kind would be 7 years.
19. With regard to whether the information would have, hypothetically, ever existed DIT explained that in its view such information would not have existed. In support of this position it explained that it did not consider that that UKDSE formerly (UKTI DSO) held this information as it does not relate to the work of the UKTI DSO/DIT UKDSE. DIT suggested that the complainant was envisioning a relationship between UKTI DSO/DIT UKDSE that did/does not exist. DIT explained that a relationship with EDO MBM would have primarily been through Export Control Joint Unit (ECJU) who are responsible for the consideration of licence applications, not UKTI DSO/DIT UKDSE. DIT explained that no reference was found in DSO/UKDSE files following its searches, and it was its assessment that this material does not, and has not, existed.

The Commissioner's position

20. The Commissioner is satisfied that on the balance of probabilities DIT does not hold any information falling within the scope of part 1 of the request. He has reached this conclusion because in his view the searches that DIT has undertaken for this information have been sufficiently focused and detailed to ensure that if any relevant information was held it would have been located.

Part 2 of the request

Section 36 – effective conduct of public affairs

21. DIT has withheld some of the information falling within the scope of the part 2 of the request on the basis of sections 36(2)(b)(i) and (ii) of FOIA. These state that:

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation'

22. DIT provided the Commissioner with the following background to explain its reliance on these exemptions. It explained that it was the licensing authority for all transfers of strategically-controlled goods. Any organisation or individual requiring a licence for such goods must submit a written application electronically. DIT explained that upon receipt, all licence applications undergo initial assessments to identify the relevant policy and technical expertise across Government that it will seek advice from and that will inform the final decision. DIT explained that such applications are circulated to the relevant advisors across the Foreign Commonwealth and Development Office (FCDO), Ministry of Defence (MOD), Business, Energy and Industrial Strategy (BEIS) and National Cyber Security Centre (NCSC), who may consult further internally or inter-departmentally, but who are ultimately responsible for providing a recommendation, and where necessary a detailed assessment. DIT explained that such advice is collected via the SPIRE licensing system, to which the other government departments mentioned above have access. In the circumstances of this case, DIT explained it was this information to which it had applied sections 36(2)(b)(i) and (ii) of FOIA.
23. In determining whether sections 36(2)(b)(i) and (ii) are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
24. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position

could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

25. With regard to the process of seeking this opinion DIT explained that the opinion of Minister Ranil Jayawardena, Minister for International Trade was sought in relation to this request. DIT explained that Minister Jayawardena was provided with a submission on 24 February 2021 with the rationale as to why the exemptions could apply and a sample of the information held. Minister Jayawardena's office responded to the submission on 26 February 2021 stating that the Minister was content with the recommendation that sections 36(2)(b)(i) and (ii) were engaged. Whilst the rationale as to why the exemptions apply is contained in the recommendation to the qualified person, to which the latter's opinion simply agreed, the Commissioner is satisfied that this is an appropriate process to follow (and is in line with the approach taken by other central government departments).
26. Turning to the substance of the opinion, the qualified person argued that the release of the information 'would be likely to' (rather than 'would') result in the inhibition of the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation regarding future export licence applications and the invaluable assessments and advice from other government departments involved in this process. The qualified person argued that there is a real concern that the nature and quality of the advice shared between officials during case assessment, which is an essential part of the licensing process, would be impaired significantly by the risk that the advice might in future be disclosed. Such officials may be reluctant to provide that advice, or at least to provide it in disclosable, ie, written form. Alternatively, they may be less inclined to include the same level of detail as they do now.
27. The Commissioner is satisfied that this was a reasonable opinion for the qualified person to come to. It is understood by the relevant consultees across government that the comments regarding licensing applications would not be disclosed or made public. As such the Commissioner accepts that it is logical to argue the disclosure of such information could lead to inhibition in relation to organisations' comments on future applications.
28. Sections 36(2)(b)(i) and (ii) are therefore engaged.

Public interest test

29. Section 36 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the

exemption cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

30. The complainant argued that the export of Hornet bomb racks (ie the military equipment licenced for export to which this request relates) to Turkey in 2014 had significant implications for the proliferation of armed drone warfare in the Middle East and North Africa region at a time when the UK was publicly supporting a peace process in Turkey. The complainant cited a Guardian article from November 2019¹ in support of his view that without this transfer of critical miniaturised bomb release technology for drones, the Turkish military drone industry that is now expanding across the world would not have been possible. As a result the complainant argued that there is an overwhelming public interest in the public knowing more details about the UK decision to allow this licence application to be approved when allied countries such as the United States were at the same time explicitly refusing to supply the same equipment on fears of proliferation of armed conflict, fears the complainant suggested were justified by historical events that have occurred since 2014 thanks to this British decision to allow this export.
31. For its part, DIT acknowledged that transparency improves engagement between the public and government and that it is desirable that the public can satisfy themselves that decisions are taken on the basis of the best available information. More specifically, in the circumstances of this case DIT acknowledged that there is a public interest in informed debate regarding licensing and export of controlled goods.

Public interest arguments in favour of maintaining the exemptions

32. However, DIT argued that in its view the public interest favoured withholding the information exempt on the basis of sections 36(2)(b)(i) and (ii). In support of this position, DIT emphasised that decisions on licensing are made using a risk-based assessment and this process followed published licensing criteria, in addition to the advice received from relevant government departments. DIT explained that the licensing criteria against which applications were assessed in 2014, the Consolidated EU and National Arms Export Licensing Criteria², are

¹ <https://www.theguardian.com/news/2019/nov/27/revealed-uk-technology-turkey-rise-global-drone-power>

²

<https://publications.parliament.uk/pa/cm201314/cmhansrd/cm140325/wmstext/140325m0001.htm>

available for public scrutiny and to inform public debate, as are the final licensing decisions made by government³. DIT explained that in its view the public interest in information relating to licensing decisions is met through the publication of this information. Furthermore, DIT argued that the advice it receives from relevant government departments regarding export licence applications is a process preserved by the open environment in which the free and frank advice and exchange of views can take place. It emphasised that the advice itself directly affects the decisions made to proceed, or not to proceed with export licences. In DIT's view the public interest in maintaining the integrity of assessments, including the advice and views shared between officials, and in turn public interest in maintaining the integrity of the licensing decisions, outweighed any arguments in favour of transparency in the circumstances of this case.

Balance of the public interest arguments

33. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
34. The Commissioner accepts DIT's position that for the licensing process to operate effectively it must be possible for government departments to be able to offer free and frank advice on particular applications. Furthermore, the Commissioner accepts that disclosure of the specific advice provided by departments in relation to a particular application risks having a chilling effect on the extent of contributions from government departments. This is on the basis that officials may be less open or candid if they are concerned that the advice they provide would be disclosed under FOIA in the future. The Commissioner is satisfied that despite the passage of time since the advice was given, this remains a genuine risk in the circumstances of this case. In the Commissioner's view the chilling effect arguments attract notable weight.
35. Turning to the public interest in disclosing the information, the Commissioner acknowledges DIT's point that some transparency is provided by the availability of the consideration criteria and final

³ <https://www.gov.uk/guidance/strategic-export-controls-licensing-data>

licensing decision. However, in his view the public interest in transparency would be significantly enhanced if details of internal government consultations were disclosed in respect of individual cases. The Commissioner accepts that in light of the specific issues raised by the complainant in relation to this licence, such arguments arguably attract additional weight.

36. Nevertheless, the Commissioner has concluded that the public interest narrowly favours maintaining the exemptions. The Commissioner has reached this conclusion given the weight that he considers should be given to the public interest arguments and as a result the consequent risks of undermining the licensing programme not just in respect of a single decision, but in relation to the consideration of potentially all applications in the future. In addition, whilst the Commissioner acknowledges the importance of transparency in such matters, in his view the insight disclosure of the withheld information would provide in this specific case is arguably relatively limited.

Section 41 – information provided in confidence

37. DIT also sought to withhold some of the information in the scope of the request on the basis of section 41(1). This states that

‘(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.’

38. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.

39. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- whether the information had the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and,

- whether an unauthorised use of the information would result in detriment to the confider.

40. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

41. The Commissioner has assessed each of these criteria in turn.

Was the information obtained from another person?

42. With regard to the requirements of section 41(1)(a), DIT explained that the information it was withholding on the basis of section 41(1) was information it had received from EDO MBM Technology as part of the licence application process. Having reviewed the information in question the Commissioner is satisfied that it does constitute information provided to DIT by the third party in question, or is information based on such information. Section 41(1)(a) is therefore met.

Does the information have the necessary quality of confidence?

43. In the Commissioner's view information will have the necessary quality of confidence if it is not otherwise accessible and, it is more than trivial.

44. With regards to the quality of confidence, DIT explained that the information was derived from confidential contracts EDO MBM Technologies had entered into with their customers. The confidential sensitive commercial information falling within scope of this request is the End User related export licence applications from EDO MBM Technologies in respect of the proposed export of Military rated equipment overseas.

45. The Commissioner has had sight of the withheld information and accepts that it is not otherwise accessible and it cannot be said to be trivial. Consequently, the Commissioner is satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

46. In respect of this limb, DIT 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). The information provided on licence applications is information provided in confidence to the Government solely to enable HMG to consider whether a licence for export of certain strategic goods can be granted. Article 43 of the Export Control Order 2008 sets out the purposes for which information held by the Secretary

of State in connection with the operation of export controls may be used. In particular, article 43(2) states that the information 'may be used for the purposes of, and for any purposes connected with (a) the exercise of functions in relation to any control imposed by this Order or by any other order made under the Export Control Act 2002'.

47. More specifically, in relation to the circumstances of this case DIT explained to the Commissioner that EDO MBM Technology Limited had stated that:

'...we enter into Non-Disclosure Agreements with all of our customers, and any information provided to us by them is regarded as confidential and should not be released into the public domain. The information is commercially sensitive both for EDO MBM and for the customer. We are legally bound by these agreements.'

48. In light of these points, the Commissioner is satisfied that the information was provided to DIT with the clear expectation that it would remain confidential.

Would disclosure be of detriment to the confider?

49. DIT argued that disclosure of information would harm the commercial interests of EDO MBM Technology Limited. This is because disclosure of the information would reveal specific sensitive information, derived from confidential contracts, that would be likely to damage the trading relationship between the UK company and their customer or customers. DIT further explained that this would be likely to risk a loss of any current contracts in place and would be likely to risk future trading opportunities with that customer or customers, and with other potential customers who would be likely to be concerned that their information might be disclosed under FOIA if they trade with the UK company.
50. DIT confirmed that it had consulted EDO MBM Technology Limited in December 2021 to confirm the company's view on the sensitivity of the information it provided to DIT during the export licensing application process and its position supported the points set out in the preceding paragraph.
51. The Commissioner is satisfied that if export licence information was to be disclosed this would be likely to compromise the commercial interests of EDO MBM Technology Limited in the way described above.

Is there a public interest defence to the disclosure of the information?

52. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public

interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). British courts have historically recognised the importance of maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.

53. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidentiality. The Commissioner is therefore required to consider whether DIT could successfully rely on such a public interest defence to an action for breach of confidence in this case.
54. The complainant's arguments to support his view that there is a significant public interest in the disclosure of the information are set out above at paragraph 30.
55. DIT argued that release of this information would undermine the export licensing process as exporters might be reluctant to include the same level of information on export licence forms if there is a risk that some or all of the information they submit might be made public. This would impact on DIT's ability to assess licence applications effectively, it would also impact the exporter and their overseas customers because of the risk of delays to licence applications due to insufficient/incomplete information and the risk of applications being stopped or refused as a result of this. In light of this DIT argued that in its view it did not consider there to be an overriding public interest that would cause DIT to set aside its obligation of confidence to EDO MBM Technology Limited.
56. For the reasons discussed above, the Commissioner accepts that there is a public interest in disclosing information which would make the process of arms licensing more transparent. In the circumstances of this case disclosure of the information withheld on the basis of section 41(1) would provide a direct insight into the exchanges between DIT's predecessors and EDO MBM Technology Limited in relation to this particular application. Noting the questions that have been raised about this licensing decision in the media article cited by the complainant, the Commissioner accepts that such a public interest should not be underestimated.
57. However, the Commissioner recognises that there is a strong public interest in the export licence application process operating effectively and ensuring that exporters who are applying for licences properly and fully cooperate and engage with DIT. The Commissioner accepts that if information given as part of the export licence application process was disclosed, thus undermining DIT's confidentiality obligations, this would directly impact on this process.

58. Taking the above into account, whilst the Commissioner acknowledges the weight of the public interest in disclosure of the information, given the broad impact this would have on DIT's licensing of such applications in the future, he has concluded that there is not a sufficiently compelling argument in support of a public interest defence against an action for breach of confidence.
59. The Commissioner has therefore concluded that the information in question is exempt from disclosure on the basis of section 41(1) of FOIA.
60. The Commissioner has not considered DIT's reliance on section 43(2) of FOIA as it this exemption was only applied to the same information to which section 41(1) was cited.

Right of appeal

61. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

62. 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.

63. 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

Jonathan Slee
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