

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2022

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence seeking information about a meeting a defence Minister had with particular companies in April 2018. The MOD provided information in response to the request but in doing so redacted information from documents on the basis of sections 27(1)(a) and (c) (international relations) and 43(2) (commercial interests) of FOIA. The complainant challenged its reliance on these exemptions.
2. The Commissioner's decision is that the redacted information is exempt from disclosure on the basis of sections 27(1)(a) and (c) or section 43(2) and that the public interest favours maintaining each of exemption.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the MOD on 10 November 2020:

'Government transparency data shows on the 12th April 2018 Minister Guto Bebb met with the organisations Leonardo, Rolls Royce, PT PAL and Airbus. Please provide the following:

(a) A complete list of each attendee for all meetings, with full names and titles for every attendee, as well as who each attendee represents

- (b) The exact time and duration of when the meetings took place
 - (c) A copy of the agendas for each of the meetings
 - (d) Materials that were handed out and received in each of the meetings, such as presentation slides, research documents, brochures, reports, and leaflets
 - (e) Minutes taken during the meetings, as well as any accompanying briefing notes and papers.'
5. The MOD responded on 21 December 2020 and explained that following a search of its records it could not locate any information falling within the scope of the request.
 6. The complainant contacted the MOD on 26 January 2021 and asked it to conduct an internal review of this request.
 7. The MOD informed him of the outcome of the review on 18 February 2021. The review established that information falling within the scope of the request had been located and explained to him that the business unit in question responsible for answering the request had been asked to re-process it by 18 March 2021.
 8. The MOD did not provide the complainant with a revised response to his request until 2 June 2021 (albeit the response was dated 1 March 2021). The response explained that the Minister's itinerary for 12 April 2018 had changed but due an administrative error the published transparency return was based on the initial itinerary rather than the revised one. The MOD confirmed that under the revised initial itinerary the Minister did not meet representatives of Leonardo, Rolls Royce, and Airbus. However, he did meet with representatives from PT PAL, PT Len, PT Pindad and PT DI. In respect of such a meeting the MOD provided the complainant with information falling within parts (a) to (d) of his request and provided redacted documents falling within the scope of part (e). The MOD explained that some information had been withheld on the basis of section 40(2) and that some parts of the documents disclosed had been redacted on the basis of sections 27(1)(c) and 43(2) of FOIA.
 9. The complainant contacted the MOD on 22 June 2021 in order to challenge the MOD's reliance on sections 27(1)(c) and 43(2) to withhold parts of the disclosed documents falling within part (e) of the request.
 10. The MOD informed him of the outcome of the internal review on 19 August 2021. The MOD concluded that the redacted information was

exempt from disclosure on the basis of sections 27(1)(a) and (c) and 43(2) of FOIA. The MOD explained that its public interest explanations in relation to both exemptions were brief as section 17(4) of FOIA was considered to be applicable.¹

Scope of the case

11. The complainant contacted the Commissioner on 20 August 2021 in order to complain about the way his request for information had been handled. More specifically, he disputed the MOD's position that disclosure of the information would be harmful to international relations or commercial interests, and even it were, he argued that the public interest favours disclosure of the information.

Reasons for decision

Section 43 – commercial interests

12. The majority of the information withheld from the documents provided to the complainant was redacted by the MOD on the basis of section 43(2) of FOIA. This states that:

'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).'

The MOD's position

13. The MOD explained that the information which was withheld on the basis of this exemption was provided to it by a number of British based companies and/or relates to their commercial interests and potential partnerships overseas. The MOD argued that releasing this information would be harmful to the commercial operation of the companies themselves, in particular their ability to compete overseas, and would also result in those companies losing confidence in the MOD as a trusted business partner and promoter of such companies interests abroad. The MOD argued that it followed that its reputation for being a commercial partner to such companies would also be harmed. The MOD explained that

¹ Section 17(4) of FOIA provides that a public authority does not need state why an exemption applies or why the public interest favours maintaining that exemption if to do so would itself result in the disclosure of information that is exempt.

it considered the exemption to be engaged on the lower level of prejudice, ie that disclosure 'would be likely' to result in harm to commercial interests.

14. The MOD provided the Commissioner with some additional submissions which referenced the content of the withheld information which are not referred to in the body of this decision notice.

The complainant's position

15. The complainant argued that the MOD had failed to demonstrate that disclosure would be likely to prejudice any parties' commercial interests.
16. The complainant also noted that the Indonesian Ministry of Defence has embarked on a well publicised mission to expand its military and arms procurements publishing details on social media and Indonesian state news. He therefore failed to see how disclosure of the redacted information would cause actual harm which would be of substance.

The Commissioner's position

17. 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. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance;
 - 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. The anticipated prejudice must be more likely than not.
18. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the MOD does relate to the interests which the exemption contained at section 43(2) is designed to protect.

19. With regard to the second and third criteria, the Commissioner is satisfied that disclosure of the information has the potential to harm the commercial interests of the companies in question. This is because, having reviewed the withheld information, it is clear that it contains information about the companies' current, and potential business operations. The Commissioner accepts that disclosure of this information would provide their competitors with an insight into the companies' operations, and giving them an unfair advantage, and as result in turn harm the companies' commercial interests. The Commissioner therefore accepts that there is a more than hypothetical risk of prejudice occurring to the companies' commercial interests and that the risk of it occurring is real. The second and third criterion are therefore met.
20. In reaching this conclusion the Commissioner has taken into account the basis upon which this information was shared with the MOD. The Commissioner accepts that the information about the companies contained in the withheld information was clearly provided to the MOD on the basis that it is a trusted partner and that the companies would not want information, which they considered to be inherently commercially sensitive, to be made public.
21. The Commissioner also notes the complainant's point about the openness of the Indonesian government regarding its plans for military expansion. However, the Commissioner does not consider this factor to undermine the MOD's argument that the disclosure of the withheld information would be commercially prejudicial for the reasons set out above.

Public interest test

22. Section 43(2) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest in disclosing the withheld information

23. The complainant argued that there was a public interest in the disclosure of information which would reveal the links between the Indonesian military, politicians, arms companies and the UK government. In support of this position he argued that the Indonesian military has scaled up operations in Aceh and West Papua recently causing civilian deaths, mass displacement and censoring of human rights/environmental activists leading to a declaration of concern by the UN High Commissioner of Human Rights.
24. The complainant also noted that Indonesia's Minister of Defence, Prabowo Subianto, has increased budget for military spending to

become the country's highest funded ministry. The complainant stated that a former general, Subianto has severe allegations of human rights violations against him from operations in Aceh, Papua and East Timor where it is public knowledge military operations have resulted in many thousands of civilian deaths.

25. The complainant argued that should it be clear that if the UK has, even remotely, enabled Indonesia through military and intelligence training to carry out human rights violations against civilians then it is overwhelmingly in the UK public's interest to be informed of this information.
26. For its part, the MOD acknowledged that in favour of release of the information, it is in the public interest that any government promotion of British companies abroad is as open and transparent as possible and to avoid speculation where there is a lack of accurate information. The MOD accepted that transparency would also provide reassurance that any such promotion was ethical and of benefit to the British economy.

Public interest in maintaining the information

27. The MOD argued that the failure to protect commercially sensitive information would limit the UK Government's ability to promote the British economy and lobby for the interests of British business interests in the future as release would be regarded as a breach of trust by the companies concerned and could have a significant impact upon MOD's relationship with these companies, or others, in the future. It argued that the public interest was clearly not best served in releasing information that would either impact upon the ability of British companies to compete overseas or causing those companies to lose confidence in the MOD as a trusted business partner or promoter of their commercial interests abroad.

Balance of the public interest test

28. The Commissioner agrees that there is a public interest in the disclosure of information about the support the British government gives to companies to assist them in securing business abroad. Disclosure of the withheld information in this case would provide a direct insight into the nature of support the government, at Ministerial level, had given to UK defence companies in working with the Indonesian defence industry. However, despite this insight, the Commissioner does not consider that disclosure of the information would serve the public interest identified by the complainant at paragraph 25.
29. The Commissioner considers there to be clear public interest in ensuring that the commercial interests of private companies are not harmed and that fairness of competition is not undermined. Disclosure of the information in question would therefore be against the public interest as

it would be likely to harm the particular companies referred to in the withheld information. More broadly, the Commissioner agrees that it would be firmly against the public interest for such companies to lose confidence in the MOD as a trusted partner, and one which could through the confidential exchange of information, help and support British businesses.

30. Taking the above into account the Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 43(2) of FOIA.

Section 27 – international relations

31. The MOD also withheld a small amount of information on the basis of sections 27(1)(a) and (c) of FOIA. These state that:

'(1) 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...

(c) the interests of the United Kingdom abroad.'

32. As section 27 is a prejudice based exemption in order to determine whether it applies also requires consideration of the test set out above at paragraph 17.

The MOD's position

33. The MOD argued that disclosure of the information withheld on the basis of this exemption would be harmful to the UK's ability to maintain good international relations as they are based on mutual trust and confidence. In particular, it would damage the UK's defence relationship with Indonesia. In turn this would harm the UK's ability to promote and support UK interests in Indonesia.
34. In support of its position the MOD cited the case of Campaign Against the Arms Trade v The Information Commissioner and MOD (EA/2007/0040) in which the Tribunal noted that prejudice can be considered real and if substance:

'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'.²

35. The MOD explained that it was satisfied that disclosure of the information that had been withheld in this case would be likely to result in the UK's relations being more difficult and there would be a need to contain or limit damage which would not have been necessary if this information was not disclosed. The MOD argued that the exemptions were engaged on the lower level of likelihood, ie that disclosure 'would be likely to' prejudice international relations.

The complainant's position

36. The complainant argued that MOD's response to his request had failed to demonstrate how disclosure of the withheld information would be likely to affect the UK's relations with Indonesia or any other allies.

The Commissioner's position

37. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the MOD does relate to the interests which the exemptions contained at sections 27(1)(a) and (c) are designed to protect.
38. With regard to the second and third criteria, the Commissioner has obviously had the benefit of viewing the withheld information. Having done so, he is satisfied that disclosure of it would be likely to harm the UK's relations with Indonesia, and in turn harm the UK's ability to protect its interests. The Commissioner has reached this finding given the content of the information itself and therefore he is limited in what he can add to this finding in this decision notice. However, he would emphasise that he agrees with the MOD's point that effective international relations rely on maintaining the trust and confidence of partners, and this would be clearly be undermined by the disclosure of the information. Furthermore, the Commissioner agrees with the MOD's assessment that in the words of the Tribunal, disclosure of the information would be likely to result in the UK's relations within Indonesia being more difficult. Taking the above into account, the Commissioner is satisfied that there is clear causal link between disclosure of the information and harm occurring to the UK's relations

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<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i205/Campaign%20Against%20the%20Arms%20Trade;%20EA.2007.0040%20.pdf> paragraph 81

with Indonesia, and furthermore, that there is a real and significant risk of that prejudice occurring.

39. Sections 27(1)(a) and (c) are therefore engaged.

Public interest test

40. Section 27(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of the FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest in disclosure of the information

41. The complainant's public interest arguments for disclosure are outlined above. In addition, in the context of section 27 he argued that given the UK's well published Indo-Pacific tilt and active pursuit of stronger relations with Indonesia it is overwhelmingly in the UK public's interest to understand the military alliance between the two nations and the direction of British resources to that nation.

42. The MOD accepted that release of the requested information would promote openness and transparency about relations between the UK Government and that of the Government of Indonesia at the time of the Minister's visit in April 2018. The MOD acknowledged that it would also provide an insight into how UK representatives promote and support the interests of the UK abroad.

Public interest in favour of maintaining the exemption

43. However, the MOD argued that it would be firmly against the public interest to disclosure information which would be likely to undermine the UK's international relations, in the context of this case with Indonesia, and in turn harm the UK's government's ability to promote interests in the region.

Balance of the public interest arguments

44. As noted above, the Commissioner agrees that there is a public interest in the disclosure of information regarding the UK government's work in promoting UK businesses abroad. However, the Commissioner would emphasise that the amount information that has been withheld on the basis of sections 27(1)(a) and (c) is very small and the degree to which its disclosure would serve such interests is very minimal. Furthermore, in the Commissioner's view disclosure of that information would not address the public interest identified by the complainant at paragraph 25.

45. In contrast, the Commissioner is satisfied that disclosure of the withheld information would be likely to harm UK-Indonesian relations. Furthermore, in the Commissioner's view there is a significant public interest in the UK being able to maintain effective relations with its international allies. In the context of this case, the Commissioner also agrees that there is a significant public interest in the UK government being able to support UK businesses.
46. Given the weight that the Commissioner considers should be applied to such interests, and the limited extent to which disclosure of the information would serve the public interests identified above, the Commissioner has concluded that the balance of the public interest favours maintaining the exemptions contained at sections 27(1)(a) and (c).

Right of appeal

47. 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

48. 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.
49. 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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