

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 February 2023

Public Authority: Department for Business and Trade
Address: Old Admiralty Building
London
SW1A 2DY

Decision (including any steps ordered)

1. The complainant requested information containing references to the National Security Bill in UK-Israel Trade Working Group minutes or briefings. The Department for Business and Trade (DBT) refused to confirm or deny whether it held such information and cited section 27(4) (prejudice to international relations).
 2. The Commissioner's decision is that DBT is entitled to rely on section 27(4) as its basis for refusing to confirm or deny whether it holds the requested information.
 3. The Commissioner does not require DBT to take any steps.
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Request and response

4. On 8 August 2022, the complainant made the following request for information to The Department for International Trade (now the Department for Business and Trade (DBT)):

“Any UK-Israel Trade Working Group minutes or briefings that refer to the National Security Bill currently under public consultation and parliamentary scrutiny.”

5. DBT’s initial position was to refuse the request under section 27(1)(a)(c)(d), which relates to information, the disclosure of which, would be likely to prejudice (a) relations between the UK and other states (c) the interests of the United Kingdom abroad, and (d) the promotion or protection by the United Kingdom of its interests abroad, if disclosed.
6. DBT’s position at the internal review and its final position is to neither confirm nor deny that the information is held under section 27(4) as doing so would be likely to prejudice the interests protected by section 27(1). DBT confirmed that it was additionally relying on the exemption in section 35(3) (Formulation of Government Policy ‘Neither Confirm nor Deny’ (NCND)).

Reasons for decision

Background

7. DBT has provided the following background information to the request.
8. The UK and Israel are currently in negotiations for an upgraded Free Trade Agreement (FTA). There is an existing FTA in place between the UK and Israel, which was signed in 2019 and replicates the effect of various EU-Israel trade agreements, most of which date back to the 1990s.
9. A public consultation was held in early 2022 to inform policy toward this FTA. DBT (then DIT) released a response to this consultation in July 2022. The first round of negotiations was held in September 2022 and the second round is likely to take place in Spring 2023.

Section 1(1)(a) – Neither confirm nor deny

10. The right of access under the FOIA is in two parts. Section 1(1)(a) provides a right to receive confirmation or denial from a public authority as to whether requested information is held. Section 1(1)(b) provides a right to be provided with that requested information where it is held.

11. Both rights are subject to exemptions. Clearly, if a public authority is not obliged to comply with section 1(1)(a) because an exemption applies, it is not obliged to provide requested information where that is held. In this case, DBT is arguing that it is exempt from its duty to comply with section 1(1)(a). This position is widely referred to as "NCND" – neither confirm nor deny.
12. Whilst DBT did not initially rely on this provision the Commissioner is satisfied from explanations provided that its initial response and its final position should not be taken as confirmation or denial that the information is held.

Section 27 – prejudice to international relations

13. Section 27(4) of the FOIA provides an exemption from complying with section 1(1)(a) of the FOIA if to do so would, or would be like to, prejudice the interests protected by section 27(1).
14. DBT has confirmed that the interests in section 27(1) it considers would likely be harmed are:
 - (a) relations between the United Kingdom and any other State,
 - (c) the interests of the United Kingdom abroad, or
 - (d) the promotion or protection by the United Kingdom of its interests abroad.
15. DBT has confirmed that it is standard practice and established government policy both in the UK and overseas, for content of sensitive discussions under live negotiation not to be released publicly. This is because policy remains under formation while both sides negotiate the content of the FTA, and because regular disclosure of our negotiating positions would likely undermine negotiating capital. It would likely also impact international relations as negotiation partners would not be able to trust that negotiations are confidential or secure.
16. DBT has further clarified that protecting what is or is not part of negotiations is essential to achieve the best outcomes in the negotiations, which deliver for businesses and the public.
17. DBT has argued that, if it were to disclose information relating to confidential talks with a negotiating partner, it would likely damage trust with that partner, undermine its international negotiating credibility and potentially set a precedent that any element of the sensitive negotiations can be accessed through the FOIA.

18. Having considered DBT's submissions the Commissioner is satisfied that there is a causal link between DBT confirming whether or not it holds the requested information and harm occurring to the UK's relationship with Israel. He accepts that confirming or denying whether information is held would be likely to indicate a current negotiating position and, for the reasons above, result in prejudice to the factors identified in the exemption.
19. The Commissioner therefore agrees that section 27(4) is engaged.
20. In reaching this decision the Commissioner has referred to a previous decision notice issued in relation to an equivalent request and comparable application of section 27(4)¹. He is satisfied that the conclusions reached in that notice are transposable to this case.

Public interest test

21. Section 27(4) is a qualified exemption. Therefore, the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held.
22. The complainant has argued that the request relates a pressing public interest question, namely, to what extent has the Israeli government used bi-lateral trade negotiations to influence the UK government's introduction of the new National Security Bill and what concessions or refusals have been made by the UK in this area of policy implementation. The complainant has argued that this is a question that directly impacts the civil liberties and human rights of political activists and journalists in the UK.
23. DBT has acknowledged that confirming or denying if information is held would increase the public's understanding of the UK-Israel trade negotiation. It has recognised there is a general public interest in the international relations relating to trade and that greater accountability increases public confidence in government decision-making and helps to encourage greater public engagement with political life.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4019566/ic-45141-y0f5.pdf>

24. DBT has acknowledged that an informed and involved public is important and that is why it is committed to providing regular summaries on government transparency platforms at agreed points of the negotiation process.
25. In relation to the public interest in maintaining the exemption, DBT has argued that the effective conduct of the UK's international relations depends upon maintaining the trust and confidence of other states and international organisations. This relationship allows for the free and frank exchange of information between the UK and its partners. In turn this allows the UK to effectively protect and promote its interests abroad.
26. DBT has further argued that to secure trade deals in the UK interest and further foreign policy aims, it needs to maintain a stable relationship with negotiating partners. Protecting this relationship and the trust between states is in the public interest.
27. With regards to public scrutiny more broadly, DBT has argued that it has made a voluntary commitment to Parliament to release information at agreed milestones in the negotiations. DBT has stated that this disclosure is standard practice and applied across all FTAs, including the UK-Israel negotiations. These include a set of negotiation objectives at the outset of negotiations, Written Ministerial Statements following the conclusion of formal rounds, and time for parliamentary scrutiny once an agreement has been signed and each of these commitments has been adhered to in full throughout this trade negotiation. DBT considers that the public interest is served elsewhere by a voluntary parliamentary commitment to detail progress of agreements in this way. Information relating to the negotiations will be accessible to the public at large through this formal transparency exercise at the appropriate and agreed milestones.
28. In determining where the balance of the public interest lies the Commissioner acknowledges that the complainant's arguments carry some weight.
29. However, the Commissioner recognises there is a slightly stronger public interest in protecting the integrity of international trade discussions through maintaining confidentiality and trust. Providing confirmation or denial in this case would be likely to undermine this process. While each FOIA request must be treated on its own merits, the Commissioner recognises the public interest in protecting the safe space in which international trade discussions are held. The Commissioner notes that these processes were ongoing at the time of the request which adds

weight to the public interest in favour of maintaining the exemption in this case.

30. The Commissioner therefore agrees that DBT is entitled to rely on section 27(4) as its basis for refusing to provide confirmation or denial as to whether the requested information is held.
31. Given the Commissioner's decision with respect to section 27(4), he has not gone on to consider whether DBT can also rely on section 35(3).

Right of appeal

32. 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

33. 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.

34. 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

Christopher Williams
Senior Case Officer
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