

The Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 September 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 about UK arms export licence applications. The request was addressed to the Department for International Trade (DIT), which is now the Department for Business and Trade (DBT) following the machinery of government changes in February 2023. DBT withheld some information under sections 36, 40, 41 and 43 of FOIA.
2. The complainant challenged the application of sections 36, 41 and 43.
3. The Commissioner's decision is that sections 36(2)(b)(i) and (ii) are engaged and the public interest favours maintaining the exemptions, because disclosure would be likely to prejudice the effective conduct of public affairs.
4. The Commissioner does not require any further steps as a result of this decision notice.

Background

5. On 14 September 2022 the complainant sent the below request to DIT:

"I am writing to make a request under [FOIA] about the Export Controls Joint Unit (ECJU) and UK arms export licensing processes with regard to Saudi Arabia. In the period 1 October 2016 to 31 December 2016:

- 1) How many times were concerns under Criterion 2 of the Consolidated EU and National Arms Export Licensing Criteria raised about exports of military technology and equipment to Saudi Arabia, by officials from which departments? Please provide the dates on which any such concerns were raised.
 - 2) How many times and on what dates was Saudi Arabia discussed at the weekly refusals meeting regarding arms export licences?
 - 3) How many times were licensing decisions regarding Saudi Arabia referred to Ministers, and which Ministers were consulted, on what dates?
 - 4) What guidance, if any, was issued to officials regarding the threshold of what constitutes a clear risk that weapons might be used in the commission of a serious violation of international humanitarian law? Please provide copies of the guidance".
6. The complainant has explained that DIT responded on 8 December 2022 saying it held some information.

Request and response

7. On 11 January 2023, the complainant then wrote to DIT and requested information in the following terms:

"Thank you for your letter of 8 December 2022 confirming that you hold some of the information I asked for. I am writing to request clarification of some of the detail of your response, and for the release of information held by you.

Re [sic] Part 1

In relation to how many export licence applications, respectively, were concerns raised on 26, 27, 28 October and 9 November? (Information is given as to the number of licence applications about which concerns were raised on 23 November, but the same was not done for the other dates.)

Re: the concerns raised on 26 October "and subsequently" on 27 and 28 October respectively: were these the same concerns being raised

again, or were they new/different concerns? And were they in relation to the same export licence application(s) or different ones?

Please provide copies of the concerns raised on 26, 27 and 28 October, 9 November and 23 November 2016, as indicated in your response.

Re: Part 2

It is my understanding that there is "a weekly denials meeting where we discuss any case or licence application where any of the three advisory Departments are proposing to recommend refusal": see <https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/fco-policy-on-arms-exports/oral/44451.pdf> . [sic] Given that DIT houses the ECJU, which coordinates export licensing policy, I had assumed that DIT would hold the records relating to the weekly denials meeting. Is this not the case? Please advise which Department holds the information regarding denials meetings.

Re: Part 3

Please release the email, with an attached email chain, that was sent to the Secretary of State for International Trade, Rt Hon Liam Fox MP and Minister Garnier on 21 December 2016; and the ministerial submission that was sent to Minister Garnier on 10 November 2016".

8. In February 2023, some machinery of government changes were announced. As part of the changes, DIT was merged with the Department for Business, Energy and Industrial Strategy to form DBT.
9. DBT responded on 13 April 2023, and its response is summarised below.
10. For part 1 of the request, it disclosed some information, and said some information was not held. It also withheld some information under sections 36 (prejudice to effective conduct of public affairs), 40 (personal information), 41 (information provided in confidence) and 43 (commercial interests) of FOIA.
11. The withheld information relates to the request for "copies of the concerns raised on 26, 27 and 28 October, 9 November and 23 November 2016". It also includes information about some concerns raised on 14 December 2016. Although the complainant had not specifically asked for a copy of those concerns in their request, the Commissioner's understanding is that DBT considered they fell within scope of what the complainant was seeking so it included them within the request's scope.

12. For part 2, DBT said that whilst it holds the type of information in question (information about refusals meetings), it does not hold the particular information the complainant wanted (discussions about Saudi Arabia).
13. For part 3, DBT withheld all of the requested information under sections 36, 40, 41 and 43 of FOIA.
14. Following an internal review, DBT wrote to the complainant on 7 July 2023, upholding its original decision to apply sections 36, 40, 41 and 43 of FOIA.

Scope of the case

15. The complainant contacted the Commissioner on 20 July 2023 to complain about the way their request for information had been handled.
16. The request that the complaint focuses on is the request of 11 January 2023.
17. The complainant has challenged DBT's reliance on sections 36, 41 and 43 of FOIA.
18. They stated they are not challenging DBT's reliance on section 40.
19. During the Commissioner's investigation, DBT withdrew its reliance on section 41 in respect of information within scope of part 3 of the request, but applied section 42 (legal professional privilege) to some of that information.
20. The Commissioner considers that the scope of this case is to decide whether DBT is entitled to apply sections 36, 41 and 43 to part 1 of the request, and sections 36, 42 and 43 to part 3 of the request.
21. He will consider section 36 first, because it has been applied to all of the withheld information. He will only consider the other exemptions that DBT is relying on in the event that he decides section 36 does not apply.

Reasons for decision

Section 36(2)(b)

22. DBT is relying on sections 36(2)(b)(i) and (ii) to withhold the information.

23. Section 36(2) of FOIA states that:

"Information ... is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under [FOIA]—

...

(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 ...".

24. DBT provided the Commissioner with some background information that is worth quoting here:

"[DBT] is the licensing authority for all transfers of strategically controlled goods. Any organisation or individual requiring a licence must submit a written application electronically. Upon receipt, all licence applications undergo initial assessments to identify the relevant policy and technical expertise across Government that [DBT] will seek advice from ... Applications are circulated to the relevant advisors ... Advisors may consult further internally or inter-departmentally, but they are ultimately responsible for providing a recommendation, and where necessary, a detailed assessment. Advisors ... provide this information on SPIRE, the Export Control Joint Unit's (ECJU) web-based processing system that informs the assessment of licensing applications ... ECJU, the UK's export licensing control authority, sits within DBT ... ECJU is able to suspend, refuse or revoke licences ...".

25. DBT indicated to the complainant that the withheld information comprises case notes, advice and views on specific licence applications.

26. The Commissioner's guidance on section 36¹ explains that the opinion of a 'qualified person' is needed to engage the exemption (for a government department such as DBT, this means a Minister of the Crown). Furthermore the opinion must be reasonable (it must be in accordance with reason, and not irrational or absurd). In assessing reasonableness, the Commissioner will consider factors including whether the envisaged prejudice relates to the subsections of section 36(2) that are being claimed (in this instance, both subsections are

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

being claimed); the nature of the information; and the qualified person's knowledge of the issue.

27. The opinion should also state whether the envisaged prejudice 'would' or 'would be likely to' occur. 'Would' means more likely than not (more than a 50% chance); 'would be likely to' is a lower threshold, where there must still be a real, significant and weighty chance of the prejudice occurring.
28. DBT's submissions to the Commissioner indicate that, as DBT told the complainant, the qualified person's opinion was that section 36 is engaged, because the envisaged prejudice 'would be likely to' occur.
29. DBT is concerned about the impact of disclosure on the nature and quality of the case notes and views shared between officials during the assessment process:

"For example, to avoid criticism of the views expressed during the assessment process, officials might simplify the information included in case notes and communications that relate to licence applications ... officials might be less inclined to include the same level of detail as they do now. This will make it harder to take decisions on issues relating to export licensing because it is imperative that decisions are taken following a well-informed risk assessment, having considered all the information available ...".
30. The Commissioner has issued a relatively recent decision notice² about the application by DIT (as was) of sections 36(2)(b)(i) and (ii) to the same type of information being withheld in this case (information about licence applications).
31. The qualified person's opinion in IC-117912-L0W3 mirrors the reasoning set out in paragraphs 28 – 29 above and in that case the Commissioner was satisfied that the opinion was reasonable (see paragraphs 26 – 27 of the decision notice in IC-117912-L0W3). The Commissioner noted that consultees understood that comments about licensing applications would not be made public and agreed it is logical to argue that disclosure could lead to the envisaged prejudice. The Commissioner takes the same view in the present case and considers that the qualified person's opinion is reasonable.

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022699/ic-117912-l0w3.pdf>

32. He therefore considers that sections 36(2)(b)(i) and (ii) are engaged, and will move on to the public interest test. As section 36 is a qualified exemption, whilst the qualified person considers that disclosure would likely cause harm it is necessary to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure, in all the circumstances of the case.

Complainant's position

33. The complainant said to the Commissioner:

"There is an overriding public interest in disclosure given the role of UK arms exports in supporting the Saudi-led coalition in the war in Yemen, including possible violations of international humanitarian law".

34. They also emphasised the need for transparency regarding "the discharge of [the UK's] commitments under national and international law".

35. The complainant's internal review request to DBT included the following:

"... While the government has a clearly stated policy that it will not licence weapons transfers where there is a "clear risk" that they "might" contribute to serious violations of [international humanitarian law] and claims to implement that policy robustly and rigorously ... it has approved the ongoing, indeed exponentially increased, supply of weapons to Saudi Arabia and its coalition partners involved in the war in Yemen since 2015".

36. The complainant also sought to show "a high level of public interest in UK arms exports to Saudi Arabia", and listed some events in 2016 (around the time of the requested licence application correspondence).

37. The complainant has highlighted a previous decision notice in case FS50789401³. That decision upheld the complainant's 2018 complaint about the then Foreign and Commonwealth Office (FCO) withholding the same type of information under sections 36(2)(b)(i) and (ii) that DBT is withholding in the present case, and ultimately required FCO to disclose it.

DBT's position

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614858/fs50789401.pdf>

38. DBT acknowledged that:

"transparency improves engagement between the public and government ... it is desirable that the public can satisfy themselves that decisions are taken on the basis of the best available information".

39. It has also said:

"The operation of the administration of the UK's system of export controls and licensing ... is a matter of public interest. It is considered that disclosure of the requested information would provide transparency around the subject of export controls and licensing and allow the public to draw a more detailed picture as to how this service is delivered".

40. However, DBT concluded that the factors in favour of disclosure are outweighed by the factors in favour of withholding the information:

"... the public interest in maintaining the integrity of assessments made in [DBT] and the advice and views shared between officials for the purpose of assessing an export licence application outweighs any arguments in favour of transparency in the circumstances of this case".

41. DBT also considers that the public interest in information about licensing decisions is already met through the publication of licensing criteria⁴ and licensing decisions⁵.

Commissioner's position

42. The Commissioner has considered his general guidance about the public interest test⁶, and his relevant guidance about section 36 specifically.

43. There is a general public interest in promoting transparency, accountability, public understanding and involvement. FOIA is a means of helping to meet that public interest, so it must always be given some weight in the public interest test.

44. The Commissioner also recognises that there is public interest in the issue that the request relates to. Specifically, decision-making by

4

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

⁵ <https://www.gov.uk/guidance/strategic-export-controls-licensing-data>

⁶ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/the-public-interest-test/>

government regarding arms export licence applications concerning Saudi Arabia. A simple internet search reveals that there has been a lot of controversy and media coverage around the subject over recent years.

45. However, the Commissioner's understanding is that the subject has already been the focus of judicial reviews and discussion in the House of Commons, going back several years⁷.
46. Information online indicates that the most recent of the judicial review proceedings concluded on 6 June 2023. Background details and the judgement are available through the website of the claimant (Campaign Against Arms Trade)⁸.
47. The proceedings that concluded on 6 June 2023 appear to have been under way at the time of the complainant's 11 January 2023 request to DBT.
48. The Commissioner therefore doubts that there is any significant public interest in disclosing the specific information that is being withheld in this case. He doubts that it would add anything substantial to the public debate on the subject.
49. He also considers that the other means of scrutiny that are available and have been used in this instance (notably the judicial reviews) go some way to satisfying the public interest that would be served by disclosure.
50. The Commissioner also considers that the licensing criteria and decisions already published online help to satisfy the public interest, as DBT said.
51. DBT's arguments against disclosure are based on the concept of a 'chilling effect'. That is, disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision-making.
52. Chilling effect arguments are likely to be strongest when the issue in question is still 'live', as it is in this instance, in the sense that decisions continue to be made on licensing applications concerning Saudi Arabia.
53. The Commissioner acknowledges the complainant's point that a previous 2019 decision required another public authority, FCO, to disclose similar

⁷ <https://hansard.parliament.uk/commons/2019-06-20/debates/D9BD8C37-E5A0-4A7E-9959-AC40A0DEE622/ExportLicencesHighCourtJudgment>

⁸ <https://caat.org.uk/homepage/stop-arming-saudi-arabia/caats-legal-challenge/legal-challenge/caats-second-judicial-review/>

information. However that does not mean that the present decision must reach the same conclusion.

54. Furthermore, in the recent 2022 decision notice cited at paragraph 30 above, the Commissioner assigned "notable weight" to the chilling effect arguments put forward by DIT (paragraph 34 of that decision notice).
55. As in IC117912-L0W3, the Commissioner has considered the risk of disclosure undermining the licensing programme not just in respect of a single decision, but in relation to the consideration of all applications in the future (see paragraph 36 of that decision). Accordingly the envisaged prejudice has a relatively high weight in terms of severity.
56. The Commissioner considers that the public interest factors in favour of maintaining the exemptions outweigh those in favour of disclosure.
57. He therefore finds that DBT is entitled to withhold the information under section 36 of FOIA.

Other matters

58. The complainant is unhappy with DBT's internal review, saying that DBT "failed to adequately consider the content of my request for review: it has not responded to any of the substance of my request for review".
59. The Commissioner notes that DBT's internal review response does not specifically address all of the complainant's points and comments in the review request.
60. Internal reviews are a matter of good practice rather than a statutory requirement. The internal review guidance in the section 45 Code of Practice⁹ does not say public authorities should comment on every concern, but does say they should "pay particular attention to concerns raised".
61. DBT may wish to consider that guidance when completing future internal reviews.

⁹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-45-code-of-practice-request-handling/>

Right of appeal

62. 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

63. 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.
64. 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

Daniel Kennedy
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