



Neutral citation number: [2024] UKFTT 00708 (GRC)

Case Reference: EA/2020/0305

**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Heard by Cloud Video Platform  
Heard on: 12 December 2022  
Decision given on: 31 July 2024**

**Before**

**TRIBUNAL JUDGE NEVILLE  
TRIBUNAL MEMBER M SAUNDERS  
TRIBUNAL MEMBER P TAYLOR**

**Between**

**DR EMMA L BRIANT**

Appellant

**and**

**(1) THE INFORMATION COMMISSIONER  
(2) THE MINISTRY OF DEFENCE**

Respondents

**Representation:**

For the Appellant: Ms A McColgan KC, counsel

For the First Respondent: Written submissions only

For the Second Respondent: Ms J Thelen, counsel

**Decision:** The appeal is dismissed

**OPEN REASONS**

**Introduction**

1. On 21 August 2019 Dr Briant made the following request for information to the Ministry of Defence (“MOD”):

“Under the FOI Act I am writing please to request a copy of a final project report for a research and communication campaign in Ukraine to win back control of Donetsk undertaken by Strategic Communication Laboratories (SCL) – this may not be a UK campaign but the report was shared with the MoD. I would appreciate seeing the report

as well as any associated communications and a list of any meetings about this specific project and related outcomes or proposals, as well as people involved please (period of interest – 2014- 15).”

2. SCL was the parent company of Cambridge Analytica Limited, prior to the latter’s closure in 2018 following the well-known scandal over non-consensual personal data collection from Facebook users for targeted political advertising.
3. On 24 September 2019 the MOD informed Dr Briant that it would neither confirm nor deny that it held the requested information, on the basis that two statutory exemptions under the Freedom of Information Act 2000 were engaged. First, under section 26(3), revealing whether the information was held “could reveal potential Armed Forces tactics, which would undermine the ability of the MOD to conduct effective operations.” That risk was considered to outweigh what the MOD acknowledged was a “general public interest in Government operations with the SCL Group”. Second, under section 27(4), revealing whether the information was held could harm the relationship between the UK and Ukraine. The potential impact on those international relations from revealing whether there was an interest in the Donetsk region from the UK government would outweigh the public interest already identified. The MOD’s decision was maintained on internal review.

#### The Information Commissioner’s decision

4. Dissatisfied, Dr Briant made a complaint to the Commissioner. She argued that the report concerned what may have been the “first early trial of what became the Cambridge Analytica big data methodology”, that given the “later electoral and data abuse by this company” the public interest supported disclosure, and that simply revealing the project’s existence would not jeopardise national defence or international relations.
5. The Commissioner conducted an investigation. Both Dr Briant and the MOD submitted further reasoning in support of their respective positions, the latter maintaining that some of the information it disclosed to the Commissioner could not be shared with Dr Briant as itself exempt from disclosure under s.17(4). Dr Briant raised a new issue, being that the (then) Foreign & Commonwealth Office had disclosed in response to a separate request of 27 December 2019 that it held correspondence relating to MOD activities in Ukraine and the report that had been requested. She also claimed that SCL had shared the report itself with a number of people.
6. In a decision notice dated 19 August 2020, the Commissioner decided that the MOD was entitled to rely on the exemption at s.27(4). In doing so, he first agreed with the MOD that confirming or denying that the information was held would be likely to prejudice relations between the UK and Ukraine so as to engage section 17(4). As to the FCO request, the Commissioner noted that the FCO’s actual position had been to neither confirm nor deny that it held the requested information, and that the Commissioner was in any event prevented from considering circumstances post-dating the present request for information. We pause to note that the correct date to consider was actually when the MOD issued its response to the request.

#### **The appeal**

7. Dr Briant appealed to the Tribunal on 6 November 2020, the MOD being added as a party thereafter. The appeal was heard on 10 March 2021, but the Tribunal’s decision to dismiss

the appeal<sup>i</sup> was subsequently set aside under rule 41 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. It was then relisted before us to consider afresh. Unfortunately this decision has been severely delayed, by a range of factors that have nothing to do with the parties or this appeal in particular, and the parties are asked to accept the Tribunal's apologies.

8. At the hearing, we confirmed that the documents upon which the parties rely were contained in a 281 page open bundle. Ms McColgan and Ms Thelen each provided helpful skeleton arguments and bundles of authorities were provided on behalf of Dr Briant and the MOD. We heard oral evidence from Dr Briant, and from David Stevens, the Assistant Head of Strategic Messaging at the MOD.
9. The MOD had also provided a closed bundle containing the respondent's closed Responses, the unredacted copies of the letter from the MOD to the Commissioner dated 10 June 2020 at C72 of the open bundle and Mr Stevens' witness statement, and a closed skeleton argument from Ms Thelen. It was directed pursuant to rule 14(6) that this material could be relied upon in the proceedings without being disclosed to any person other than the two respondents, as we required sight of it in order to decide the issues before us and disclosure to Dr Briant would defeat the purposes of appeal and could (subject to our final determination) prejudice the interests protected by sections 26 and 27 of FOIA. In accordance with the guidance given in Browning v Information Commissioner [2014] EWCA Civ 1050, we have carefully kept the fairness of the closed material procedure under review.
10. After hearing the open evidence, we accordingly went into closed session, from which everyone apart from those present on behalf of the MOD was excluded, so that we could hear closed oral evidence and submissions that were thoroughly scrutinised in line with our inquisitorial function and to ensure fairness. Following that session, a narrative was prepared setting out as much as possible of what had transpired so that Ms McColgan could make submissions.

## **The law**

11. If a person makes a request to a public authority under FOIA, then section 1(1) places it under two duties: first, to inform the requester whether that information is held, and second, if so, to communicate it. Under section 2, each of those duties can be disapplied according to a number of exemptions at Part II of the Act:

### 2 Effect of the exemptions in Part II.

- (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either —
  - (a) the provision confers absolute exemption, or
  - (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

section 1(1)(a) does not apply.

- (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
  - (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
  - (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

12. In this case, the MOD argues that the duty to confirm or deny does not arise . Insofar as is relevant, and in the order they were addressed by the parties, the relevant exemptions put forward are as follows:

Section 26 – Defence

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—
  - (a) the defence of the British Islands or of any colony, [...]
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

Section 27 – International Relations

- (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, or
  - (d) the promotion or protection by the United Kingdom of its interests abroad.  
[...]
- (4) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)—
  - (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or
  - (b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

13. In establishing whether either exemption is engaged: first, the applicable interests must be identified (for example, the relationship between The United Kingdom and a particular

state); second, it must be established that confirming whether the requested information is held would, or would be likely to, prejudice those interests; and third, the likelihood of prejudice to those interests must be measured.

14. On the requirement for prejudice, we must take into account that a ‘neither confirm nor deny’ response (“NCND”) may protect against prejudices that are wider than the instant circumstances, because “as and when it applies, it stops inferences being drawn on the existence of types of information and enables an equivalent position to be taken on other occasions”: Savic v Information Commissioner [2016] UKUT 535 (AAC), at [60]. The Tribunal is therefore not concerned with the contents of the requested information
15. On likelihood, only the lower “would be likely to” test needs to be met for the exemption to be engaged; this requires a real and significant risk, rather than a hypothetical possibility.
16. Once either or both exemptions are engaged, they will only exclude the duty to confirm or deny if the public interest in maintaining them outweighs the public interest in disclosing whether the MOD holds the information. Those public interest factors include the likelihood and severity of the prejudice(s) already assessed in deciding engagement, must be aggregated across all engaged exemptions, and taken as they stood on 24 September 2019, the date of the MOD’s response to the request.

#### The approach on appeal

17. As confirmed in Information Commissioner v Malnick [2018] UKUT 72 (AAC), on an appeal under section 58 of FOIA the Tribunal may review any finding of fact on which the notice in question was based. This means that the Tribunal exercises a full merits appellate jurisdiction, making any necessary findings of fact and then deciding for itself whether the provisions of FOIA have been correctly applied. But the Tribunal does not start with a blank sheet: the starting point is the Commissioner’s decision, to which the Tribunal should give such weight as it thinks fit in the particular circumstances.
18. When considering prejudice to defence and international relations we should also accord appropriate weight to the expertise and judgement of the Ministry of Defence. The Upper Tribunal in Savic was likewise concerned with the potential reactions by other states to disclosure, and held as follows:
  116. It must be remembered that what is relevant is an assessment of those reactions rather than the validity of the reasons for them looked at through “English or any other eyes”. In this area there is authority to the effect that the courts and tribunals should attach weight to the views of the government expressed through Secretaries of State, Ministers or senior civil servants because of their relevant experience and expertise in assessing such reactions (see for example APPGER v IC and FO [2011] UKUT 153 (AAC) and those cases cited at paragraph 56 of that decision). We accept that approach and comment that the nature of the written and oral reasoning on it in this case reflected its foundations.
19. The proceedings are inquisitorial, save that the Tribunal is entitled to respect the way in which the issues have been framed by the parties. In practice, establishing the factors pointing towards exclusion of the duty to confirm or deny has fallen to the MOD, those pointing the other way to Dr Briant, but we have not approached our fact-finding role by reference to any formal burden of proof.

20. A large volume of evidence was deployed in this appeal, together with detailed submissions. In formulating the reasons for our decision we have applied the well-established principles summarised in the Senior President’s Practice Direction ‘Reasons for decisions’ of 4 June 2024. We have not identified every piece of evidence relied upon, nor every step in our reasoning; what follows is our conclusions on the main issues in dispute and a sufficient explanation of how we reached them to enable the parties to understand why they won or lost. Where documents are available to the parties, or are in the public domain, we will not set them out at length.
21. We have given separate closed reasons setting out those parts of our reasoning which cannot be disclosed without defeating the purpose of the appeal or revealing information that might undermine the interests cited in the applicable exemptions.

### **Consideration**

22. The parties’ submissions were largely confined to section 27(4), so we start there.

#### Section 27(4) – Prejudice to international relations

##### *The parties’ cases*

23. The Commissioner’s submissions were either developed by the MOD or were not material in reaching our decision.
24. While we set out the MOD’s open case alongside our own assessment, we should make clear that our conclusions have been reached by reference to all evidence adduced by the parties. The MOD’s open case can be introduced by the following background contained in Mr Stevens’ witness statement:

- “5. The United Kingdom (“UK”) routinely provides advice and assistance to partner nations in developing their capability to deliver effective communications, particularly where such communications might help improve stability and lessen the risk of conflict. The MOD is on occasion called upon to lead on such assistance projects when there is a direct link with conflict, or the partner nation’s armed forces have a role in delivering said communications, and such work is typically coordinated through the Military Strategic Effects branch.
6. Not all partner nations are willing to disclose publicly such assistance, since it can undermine the effectiveness of the communications they are seeking to improve if they can be portrayed as being subject to external advice and influence. Equally, state and non-state competitors and adversaries of the UK take a keen interest in understanding how the UK undertakes communications activity overseas to support our national security interests and those of our allies and partners, and these competitors and adversaries seek to use such information to undermine or misrepresent to their own ends the aforementioned communications activity.
7. *[redacted from open witness statement]*
8. Thus information disclosed regarding such overseas communications projects, whether obtained lawfully by means such as FOIA, or by the nefarious activities of hostile actors, risks being exploited by competitors and adversaries against the interests of the UK and our allies and partners.

And by further specific reference to international relations:

24. Cooperation between the UK and Ukraine, and between the UK and other states, requires Ukraine, and other states, to trust the UK. Specifically, this includes trusting that the MOD will not comment on the confidential military tactics and capabilities of its allies, either by confirming or denying the MOD's knowledge, or lack thereof, of the use of a particular tactic or capability or the provision of military assistance. Confirming or denying whether the MOD held the requested information would be likely to damage this trust, and with it the relationship between the two countries.
25. Summarising Mr Stevens' evidence overall and the other documents upon which the MOD relies, Ms Thelen's skeleton argument puts forward the following ways in which confirmation of whether it holds the requested information would, or would be likely to, cause prejudice to international relations:
  - a. It would reveal whether or not there was an interest in the Donetsk region by the UK government at the relevant time. This is different and distinct to the later acknowledgement of cooperation, which was confirmed in the 2018 Joint Declaration by the United Kingdom and Ukraine<sup>ii</sup>.
  - b. That public announcement acknowledged that the UK and Ukraine intended to improve cooperation in cyber, hybrid defence and defence intelligence, but it did not provide details of how that may be achieved. Information had not been published to the world at large down to the level of whether or not specific campaigns or activities had been conducted.
  - c. To date, neither the UK nor the Ukrainian governments have provided any official comments as to whether the armed forces of either country held a report of the kind requested here. There are particular sensitivities around the provision of advice and assistance to partner countries around their capability to deliver effective communications.

[d-h were put forward solely in closed session]

  - i. Further, the information sought pre-dates (2014) the 2018 Joint Statement. As explained by Mr Stevens, even if the MOD and the Ukrainian government chose to make certain statements as to the nature of their current relationship, and aspects of that relationship, it does not follow that the nature of the MOD's relationship with Ukraine, and any activities arising from that relationship, prior to the Joint Statement do not remain confidential to both states unless by deliberate exception.
  - j. It could also have negative implications for the UK's relationships with other countries and regions where the UK government has been, or is, involved in defence engagement activities.
26. Some key parts of Dr Briant's case in response are as follows:
  - a. The MOD possessing a copy of the report would not indicate whether the UK had any involvement in its subject matter.

- b. UK involvement in Ukraine, and in the region of Eastern Ukraine in which Donetsk is located, has been a matter of public knowledge since at least February 2015;
- c. Evidence available in the public domain already established facts about the report that were inconsistent with the prejudice claimed. In particular:
  - i. On a now-removed post on its website, but still publicly available in a web archive<sup>iii</sup>, SCL had confirmed that it had been “contracted to collect population data, conduct analytics and develop a data-driven strategy for the Ukrainian government in pursuit of their goal to win back control of Donetsk” and that “the final project report was delivered to the President of Ukraine for his Cabinet’s assessment and shared with the UK MOD.” The MOD had contracts with SCL and could have required it to remove that text from its website.
  - ii. A BBC News article of 22 March 2018<sup>iv</sup> had quoted an SCL executive as stating that it had run “a very, very successful project in an Eastern European country where... no-one even knew they were there”.
  - iii. The report had been shared with delegates on a NATO Centre of Excellence for Strategic Communications (StratCom) in Riga on 18-19 February 2015, delivered by IOTA Global, part of SCL. The delegates were from multiple countries and the course content was not classified. The minutes had somehow been obtained by Russian propagandist bloggers who had posted (sometimes doctored) copies online.
  - iv. StratCom had publicly stated<sup>v</sup> the MOD’s important role in the ‘capacity building’ effort for Ukraine as early as February 2015, presumably with the MOD’s knowledge, including that “a delegation from the UK Ministry of Defence had previously provided a significant contribution to the Centre in StratCom capacity building for Ukraine and Georgia.” Centre holds coordination meeting for Ukrainian Georgian and Moldovan wider security sector
  - v. On 4 February 2020, Dr Briant had made a request under FOIA to the (then) Foreign & Commonwealth Office for “a full list of all correspondence and related attachments held by the FCO regarding strategic communications and research in Ukraine involving personnel at Strategic Communication Laboratories, Behavioural Dynamics Institute or IOTA Global in 2014-15”. The FCO had refused to confirm or deny whether it held the requested information, but did provide the following redacted email:

Email of 24.03.2015

<REDACTED>

I met <REDACTED> whilst he was still employed by the MoD. He was also heavily

involved <REDACTED>

<REDACTED> All extremely impressive stuff.

As I recall, there was resistance to implementing <REDACTED> (I have a copy if

interested), <REDACTED>

Might be worth meeting him. Contact is: <REDACTED>



<REDACTED>

27. Mr Stevens was capably and comprehensively cross-examined by Ms McColgan on the above points. We found him to be a candid and thoughtful witness. He developed the argument that official confirmation or denial was more apt to damage international relations than facts disclosed by third parties or through investigative journalism, a point of general principle that we accept.
28. On the second point made by the MOD above, while acknowledging the significant evidence of cooperation between UK and Ukraine, he went on to say:

“...there is a huge spectrum in terms of level of detail about tactics and capabilities, which can range from the generic assistance we are providing to Ukraine – for example infantry training – to saying that you have a particular shortcoming or weakness here in this particular area ... Ukraine would not be embarrassed by saying that they need assistance in infantry training, they have asked us. But they might have an issue with the saying where they have identified more specific weaknesses. We come back to a FOIA request that is very specifically about an alleged report in one very specific area that was at the time the single largest of neuralgia for Ukrainians, namely the seceded areas in the Dombas.”
29. We consider that this neatly encapsulates the basis upon which the MOD argues that confirmation or denial would prejudice international relations, and attracts the weight described in Savic at [116]. The wider evidence shows the situation of Ukraine and its relationships with its international partners to be of the utmost sensitivity and vulnerability.
30. On the NATO course, Mr Stevens was unaware of any findings having been made by Latvia or NATO as to how material had been obtained by bloggers. The course was not commissioned by the UK nor was the UK consulted on its content or provision, nor did it authorise any of its own material to be included. Mr Stevens considered that in any event the course was delivered in a secure environment and the content kept confidential to the attendees. He confirmed this by reference to the leaked document itself. He rejected Ms McColgan’s suggestion that any content that might have been disclosed to delegates from other states in the course undermined the present claim of prejudice to international relations, or the supposed security of the event – this ignored the difference with official acknowledgement. Nor was his view altered by the training having continued after the leak occurred. We accept what Mr Stevens says. Sharing of information in a NATO training course on a confidential basis is qualitatively different from official acknowledgement by a UK government department, and by analogy we apply the guidance in Commissioner of the Police of the Metropolis v Information Commissioner & Rosenbaum [2021] UKUT 5 (AAC) at [55]. Overall, we find that this issue does not undermine the prejudice claimed by the MOD. It may operate to increase the public interest in the other direction, to which we shall turn in due course.
31. Mr Stevens rejected that the FCO disclosure had any bearing on his views concerning prejudice to international relations. It was far from clear that the redacted email referred to the report with which the request is concerned, and he was unaware whether FCO held any report of the type requested. We agree with Dr Briant that the FCO disclosure is a piece of the evidential jigsaw that supports the general propositions she makes, but too little detail is given of the email and the context in which it was sent to discretely undermine the prejudice claimed by the MOD. We decline to draw any material inference from the involvement of

former UK military or government personnel in SCL's activities; there is no basis upon which we should treat this as importing any form of official approval or providing a material contribution to any case that the MOD must surely possess the requested information.

32. In response to questions from Ms McColgan, Mr Stevens did acknowledge that prejudice could also result from leaving an unofficial vacuum into which misinformation could be inserted, but maintained that in the present circumstances prejudice would arise from confirmation or denial that the requested information is held.
33. After Mr Stevens had concluded his open evidence, the Tribunal went into closed session. Ms McColgan was given the opportunity to raise any issues that she considered would benefit from scrutiny by the Tribunal, and asked that evidence on 'mosaic' identification said to arise from confirmation or denial be carefully tested. This was done. Following Mr Stevens' closed evidence and Ms Thelen's closed submissions, the following gist of what transpired was provided to Ms McColgan so that she could raise any further issues and make submissions:

“Mr Stevens provided some background information around the situation in Ukraine at the relevant time which was relevant to the risks he has outlined, and considered how they may potentially be engaged in this case. Mr Stevens also addressed the prejudice that would occur to international relations and defence, and the risks of those prejudices arising here if the MOD were not able to rely on NCND to respond to Dr Briant's request.

Ms Thelen made submissions in CLOSED that Mr Stevens' evidence should be accepted in that it has met some of the points made by Dr Briant in her evidence and submissions, and responded to the criticism that the risk was not limited to the confirmation risk, but strayed into the substance of the case.“

34. We are satisfied that no further detail could then, or now can, be given without undermining the purposes of the appeal or risking prejudicing the interests engaged by the claimed exemptions. Carefully weighing that risk against the importance of Dr Briant's ability to fairly participate in the appeal, we are satisfied that a rule 14 order remains appropriate and that Dr Briant has received a fair hearing.

*Conclusion on engagement, and the weight carried by the public interest in maintaining the exemption*

35. We should reiterate that we approached the closed evidence with independent and careful scrutiny, mindful of the inability of Dr Briant to challenge it and the importance of our inquisitorial function.
36. We hold that the harm asserted as arising from confirmation or denial is clearly such as to potentially engage the interests listed in section 27(1). A causal relationship between confirmation or denial is also clearly stated, the MOD's case is simply that to do so would directly harm the trust between the UK and Ukraine, and the trust reposed in the UK by other states in matters concerning international cooperation.
37. Contrary to Dr Briant's case, we further accept that the MOD's evidence justifies finding that there is a real and significant risk of such harm actually occurring. We have already set out why we found Mr Stevens' evidence reliable, and to have emerged largely undented

from the counterpoints put to him. He is clearly well-equipped to form the judgement referred to in Savic and, even without the special weight that authority suggests, the sensitivity around alleged activities of organisations such as SCL in this theatre, and at that time, is obviously of great sensitivity. Taking all evidence into account, open and closed, harm to the UK's relationship with Ukraine would (to the higher 'more likely than not' standard) be caused by any public acknowledgement of whether the requested information is held. The harm to relations with other states is minor in comparison, but does provide some contribution to the risk of harm overall.

#### The public interest in confirming or denying whether the requested information is held

38. We have carefully considered Dr Briant's evidence and submissions and the brevity with which we summarise her case should not be taken as detracting from its force. The reader will already be familiar with the Cambridge Analytica scandal. Dr Briant's evidence is that the report may disclose whether SCL's work in Ukraine was an early version of that which was later done in other countries. The Commissioner accepted that:

“...there is a significant public interest in the UK government being transparent about its relationship with SCL in light of the widely reported allegations concerning Cambridge Analytica. Confirmation as to whether or not the MOD held the requested information would directly contribute to this interest. Furthermore, confirmation as to whether or not the information is held could potentially provide the public with some hindsight into the UK government's approach to its dealings with Ukraine. In the Commissioner's view in light of the Cambridge Analytica case she accepts that the public interest in confirming whether or not the information is held should in no way be underestimated.”

39. We cannot improve upon that succinct assessment, with which we agree. Additionally in this appeal we have had the benefit of Dr Briant's evidence and the two reports she has written, together with concerns that misinformation has already been spread on the present issue that would be addressed by transparency.

40. While the MOD does not accept all the evidence relied upon by Dr Briant, nor the inferences she urges be drawn from it, the MOD nonetheless accepts that there is public interest in confirmation or denial, and acknowledges the seriousness of the circumstances surrounding the Cambridge Analytica scandal and the importance of transparency concerning any UK government association with SCL.

#### **Public interest balancing test**

41. In deciding whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, we consider all the evidence and arguments made, together with our assessment above. What follows is solely a summation of the matters openly put before us, and should not be taken as any indication of the closed evidence and submissions we have considered.

42. The Cambridge Analytica scandal concerned political manipulation, and we take notice of wider concerns over SCL's involvement in democratic processes in multiple countries. The MOD is right to acknowledge the public interest in transparency regarding any connection between the UK government and the services provided by SCL. This is especially the case

in such a serious context as the conflict between Ukraine and Russia in the Donetsk region; we are concerned with the situation at the time of the MOD's response, and the fear held at that time was the very escalation into outright war that later came to pass. The actions that the UK government takes, or chooses not to take, in avoiding war in Europe and supporting its allies could hardly be of greater public importance.

43. Yet that importance and sensitivity cuts both ways, it being likewise important that transparency does not unduly hamper the government's ability to act, for example by undermining the trust reposed in the UK by its allies. That was the intention of Parliament when the obligation to confirm or deny was made subject to the exemptions in Part II of FOIA. Taking both the open case of the MOD, as we have described it above, together with the matters that could only be put forward in closed, we consider that disclosing whether the MOD holds the requested information would cause sufficient prejudice to the UK's relations with Ukraine and other states that the opposing public interest in disclosure is outweighed.

### **Conclusion**

44. Pursuant to sections 2(1) and 27(4)(a) of FOIA, the duty to confirm or deny does not arise. The Commissioner's decision to that effect was correct in law and the appeal must be dismissed. While we cannot publicly give our full reasons, we assure Dr Briant that we have carefully and independently scrutinised and tested the MOD's case before reaching our decision.
45. Like the Commissioner, we have been able to decide the appeal without it being necessary to have regard to the exemption claimed under section 26. Any additional public interest in maintaining the exemption that might have found under section 26 would, in any event, have been aggregated with the prejudice already found sufficient to tip the scales against disclosure.

Signed

Date:

*Judge Neville*

31 July 2024

- <sup>i</sup> [https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2879/Briant%20Dr%20Emma%20\(EA-2020-0305\)%2026.05.21.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2879/Briant%20Dr%20Emma%20(EA-2020-0305)%2026.05.21.pdf)
- <sup>ii</sup> <https://webarchive.nationalarchives.gov.uk/ukgwa/20181206185656/https://www.gov.uk/government/news/joint-statement>
- <sup>iii</sup> <https://web.archive.org/web/20180323083855/https://sclgroup.cc/projects/sord/>
- <sup>iv</sup> <https://www.bbc.co.uk/news/world-43476762>
- <sup>v</sup> <https://stratcomcoe.org/events/stratcomevent-coordination-meeting-for-ukrainian-georgian-and-moldovan-wider-security-sector/4>