

Freedom of Information Act 2000 (Section 50)

Decision Notice

4 June 2007

Public Authority: Department of Trade and Industry
Address: 1 Victoria Street
London
SW1H 0ET

Summary

The Commissioner's decision is that the Department of Trade and Industry (DTI) has dealt with the complainant's request in accordance with Part 1 of the Act. He has decided that exemptions in sections 36 and 41 of the Freedom of Information Act 2000 are engaged and, in the case of the former, that the balance of the public interest favours withholding the information sought. Accordingly there is no remedial action that the Commissioner requires DTI to take.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 27 February 2005 the complainant asked DTI for information relating to the government publication "United Kingdom Strategic Export Controls Annual Report 2002" which contained information about Standard Individual Export Licences (SIELs) issued in 2002 for the export to Indonesia of components for armoured fighting vehicles, components for armoured personnel carriers, components for tanks, and military utility vehicles. For each of the SIELs he asked for:

- a) the name of the company to whom DTI issued the SIEL
- b) the type and model of military utility vehicles; the model of vehicles the components were intended for, with a brief description of the components
- c) the value of the licence
- d) the start date and ending date for the licence
- e) the end-user specified on the licence.

The complainant also asked for a copy of any documentation held by DTI, and produced during the licensing process, regardless of where the documents originated (the documentation).

DTI subsequently disclosed to the complainant the information at d).

3. On 30 March 2005 DTI refused parts a) – c) and e) of the request, citing Section 41 (Information provided in confidence) of the Act. The request for the documentation was refused citing Section 36 (Prejudice to effective conduct of public affairs). An internal review by DTI, dated 27 July 2005, upheld the initial refusal.
4. On 10 May 2005 the complainant made a second request to DTI for related information, which was refused. Following recent discussions with the Commissioner's staff, DTI has now provided the information sought in this second request. The second request is therefore not addressed further in this Decision Notice.

The Investigation

Chronology

5. On 16 August 2005 the complainant contacted the Commissioner to complain about the way in which his request for information had been handled.
6. The Commissioner began his investigation on 18 October 2006. His staff met with DTI officials twice to discuss the case, view material being withheld, and consider with DTI officials the reasons why DTI believed the exemptions applied.
7. On 5 February 2007 DTI provided the Commissioner with a copy of the relevant submission, dated 24 March 2005, to the qualified person (a DTI Minister) who had decided that the section 36 exemption applied to the documentation and that the balance of the public interest favoured withholding it.

Findings of fact

8. The Commissioner found that, for the relevant items of equipment with military applications, the number of manufacturers and suppliers within the UK was small so that naming a class of product or end user could effectively identify the supplier company or vice versa. He found that the information held was of commercial value in what was a strongly competitive international market. In order to obtain the relevant export licences (SIELs) the supplier companies had to provide information to DTI which was essential for it to issue the licences. As elaborated below, the Commissioner is satisfied that the suppliers gave this information to DTI in the expectation that DTI would only use it to issue licences and would maintain strict confidence.

Analysis

Exemptions

Section 41

9. The complainant told the Commissioner that he still held the views he had put to DTI but he did not rehearse them for the Commissioner. He had told DTI that he was not convinced that disclosing the information he sought would necessarily be an actionable breach of confidence as information about some export licences had been disclosed in the past, and he gave some examples of information that had been released about the export of certain armoured vehicles. He referred also to information that had been published about export licence applications for Iraq through the Scott Inquiry. He said that he was sceptical of the implication that it was axiomatic that disclosure of the information sought would be a breach of confidence. He understood that there would only be a breach of confidence where there was some detriment to the provider of the information. The complainant said that he was asking for a minimal amount of basic factual information about particular licence applications that were at least two and a half years old. He believed that disclosure could cause no harm to the commercial position of the companies. He added that details of some export licences could sometimes be found in The National Archives.
10. DTI said that disclosure by government of information contained in an export licence application would constitute a breach of confidence actionable by the applicant.

11. The Commissioner is satisfied that the suppliers who applied to DTI for licences were operating in a competitive international market and that they could not conduct the relevant supply business without the appropriate DTI licence. Suppliers had to provide information to DTI to enable the licences to be issued. He has seen that the information was supplied to DTI for the specific purpose of issuing licences. Taking into account the nature of this information and correspondence and discussions with the DTI, the Commissioner is satisfied that the information was supplied in the reasonable expectation that DTI would preserve strict confidentiality. The Commissioner does not consider the passage of time to have been so great as to invalidate DTI's obligations. He is satisfied that the relationship between DTI and the suppliers had the quality of confidence and accepts the DTI view that a breach of confidentiality by it would be actionable. The duty of confidence is not absolute and the Commissioner has considered whether there is an overriding public interest in disclosing the information. The grounds for breaching confidentiality must be strong ones and he has seen no evidence of an overriding public interest, either on his own view of the facts of this case or in the arguments that the complainant has put to him. The Commissioner's decision is that DTI acted correctly in withholding information under the section 41 exemption.

Section 36

12. The complainant said that he was not interested in knowing the identities of officials but in the substance of the decision making. He failed to see what public interest there was in preventing him from seeing the documents for what in his view had been a relatively mundane decision. There was so much information in the public domain already, through published reports about how the licensing process worked, that revealing more about the process in this case could hardly be a reasonable objection. He added that the precedent of the Scott Inquiry surely defeated any suggestion that revealing the substance of export licensing decision making would prejudice the effective conduct of public affairs.
13. DTI told the Commissioner that releasing advice from other government departments would enable those departments to be targeted and pressurised by their critics. This would make them less willing to provide full and frank advice in future, for fear of disclosure. This would undermine departments' sense of collective responsibility and impair the process of government and was especially an issue for controversial end user destinations such as the licences for Indonesia. The nature and quality of advice from other departments, which was essential to the licensing process, would be significantly impaired by the risk of future disclosure of their advice given in confidence. The matter was made more difficult by the parties most interested in export licensing decisions having entirely opposite views on this subject. DTI recognised that there was a legitimate

- public interest in its making available information about decisions to approve or refuse export licensing applications and in the arguments for doing so. The public needed to be satisfied that the government was operating in accordance with its published criteria in assessing export licensing applications, and that it was using its export licensing powers properly. DTI added, however, that it was already highly open and transparent regarding export licensing decisions. It published detailed annual and quarterly reports and was subject to extensive scrutiny from the House of Commons Quadripartite Select Committee, a process which in itself addressed the public interest in ensuring that the export licensing powers were being applied responsibly. DTI confirmed that it would have strongly resisted providing the Select Committee with the information that the complainant had requested.
14. The Commissioner has seen evidence that DTI had provided a qualified person, a named DTI Minister, with a submission indicating that release now of the correspondence between departments would prejudice the effective conduct of public affairs. He has seen that DTI followed due process when officials put forward the submission and accepts that the arguments put to the qualified person had substance; he is therefore satisfied that the qualified person exercised a reasonable opinion, and that the exemption is therefore engaged.
 15. The Commissioner also considered the balance of the public interest. He recognises the importance of ministers and officials maintaining collective responsibility, and the need to preserve space in which they can argue freely and frankly in private, while maintaining a united front once decisions have been made. The Commissioner is satisfied that, without proper space for full and frank deliberation by the community of departments dealing with these licensing matters, there would be less candid and robust discussions, insufficient records being created, hard choices being inadequately considered and, ultimately, the quality of government being weakened. The Commissioner has seen that the complainant made specific reference to the Scott Inquiry of the mid-1990s, but he is not persuaded that the Indonesian licences are matters of comparable immediate national importance so as to shift the balance of public interest in favour of disclosing the information sought. The Commissioner's decision is, therefore, that the public interest arguments in favour of maintaining the section 36 exemption outweigh the public interest in disclosure, so that the information has been correctly withheld by DTI.

The Decision

16. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

17. The Commissioner requires no steps to be taken.

Failure to comply

18. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

19. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 4th day of June 2007

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Prejudice to effective conduct of public affairs

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department ...
and is not exempt information by virtue of section 35, ...

Section 36(2) provides that –

“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-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or ...
- (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, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

...

Section 36(5) provides that –

“In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown, ...

Information provided in confidence

Section 41(1) provides that –

“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.”