

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 4 April 2007**

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

### Summary

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The Ministry of Defence refused to provide the complainant with copies of memoranda of understanding dating from 1973 for the supply of armaments and support to the Saudi Arabian armed forces. The Commissioner decided that, in refusing this request, the Ministry of Defence had dealt with it in accordance with Part 1 of the Freedom of Information Act.

### The Commissioner's Role

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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

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2. On 1 March 2005, the complainant asked the Ministry of Defence (MOD) for copies of:
  - a) the Memorandum of Understanding signed in 1972 specifying that the UK government contracted the then British Aircraft Corporation to act on its behalf fulfilling its obligations to the Saudi armed forces
  - b) the Memorandum of Understanding with Saudi Arabia signed on 26<sup>th</sup> September 1985
  - c) the Memorandum of Understanding with Saudi Arabia signed on 17<sup>th</sup> February 1986
  - d) the Memorandum of Understanding with Saudi Arabia signed on 3<sup>rd</sup> July 1988.

3. The complainant also listed additional requests, numbered e) to f), which were not related to Saudi Arabia. On 19 August 2005 the complainant told the Commissioner that she was not currently pursuing these additional matters. This Decision Notice refers to the Memoranda numbered a) to d) as the “requested information”.
4. On 23 March 2005 MOD told the complainant that, due to confidentiality clauses within the documents containing the information requested, it was required to consult with the other party to each of the MOUs if it was considering disclosure of any information relating to the documents. MOD said that it was consulting the overseas government concerned.
5. On 22 April 2005 MOD told the complainant that it had concluded its overseas consultation and would be responding shortly. On 26 April 2005 MOD issued a refusal notice to the complainant. MOD said that the request had been discussed with the Saudi Arabian government, which considered the content of the MOUs to be sensitive and took the view that any disclosure would be a breach of the pledge of confidentiality between the governments. Such a breach could prejudice bilateral relations with Saudi Arabia. The information could not therefore be disclosed as it was exempt under section 27 (International relations) and section 43 (Commercial interests) of the Act. Since both are qualified exemptions, MOD said that it had applied the public interest test and concluded that the significant ongoing commercial and economic benefits flowing to the UK and the UK taxpayer from these agreements would be jeopardised by the harm caused to bilateral relations by disclosure. On balance, therefore, any public interest in disclosure was outweighed by the benefits of not disclosing the information. MOD did not list any public interest arguments favouring disclosure.
6. On 26 May 2005 the complainant asked MOD to review its decision. The complainant challenged MOD’s statement that disclosure was against the public interest. The complainant disputed whether harm to bilateral relations with Saudi Arabia would have adverse economic repercussions for the UK, saying that UK military exports were heavily subsidised by the UK taxpayer and not of proven benefit to the UK economy.
7. On 26 July 2005 MOD gave the complainant the outcome of its internal review and continued to withhold the information. MOD said that the MOUs requested covered the original agreement and the extension of the defence cooperation programme with Saudi Arabia, also known as the Al Yamamah project. The earliest (1973) MOU predated Al Yamamah and related to the provision of aircraft maintenance and support services.
8. MOD apologised that it had not fully explained the balance of the public interest in relation to sections 27 and 43 in the earlier refusal notice. MOD said that, while the opinion of interested third parties was not ultimately decisive in the release of information, it was a legitimate factor to be taken into consideration when exploring the balance of the public interest. MOD added that it was not obliged to make a statement if the statement would

itself disclose exempt information. This limited what MOD could tell the complainant about the balance of the public interest. MOD was satisfied that the public interest in withholding the information outweighed that in disclosing it.

9. As regards the section 43 exemption, MOD said that the Al Yamamah project provided the UK with substantial employment and other benefits and that it would not be in the public interest to damage bilateral relations. The economic benefits of the project were a factor to be taken into account alongside the UK public interest in transparency.

## The Investigation

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### Scope of the case

### Chronology

10. On 19 August 2005 the complainant contacted the Commissioner to complain about the way in which the request for information had been handled. She said that she had made other, related, requests to MOD, the Department of Trade and Industry (DTI), and the Export Credits Guarantee Department.
11. On 4 October 2005 the complainant told the Commissioner that DTI had said that information it held did not relate to the impact of the Al Yamamah project on the UK economy. It seemed to the complainant, therefore, that neither MOD nor DTI held information to support one of the main reasons for denying the request.
12. On 28 October 2006 the Guardian newspaper reported that a copy of the 1985 MOU had been released to The National Archives (TNA) on 8 May 2006 by DTI. The newspaper published in full the 1985 MOU, which was marked "RSAF SECRET", together with related correspondence between the then representatives of the UK and Saudi Arabian governments, some of which was marked "CONFIDENTIAL". Other documents bore no security classification.
13. On 7 November 2006 the complainant told the Commissioner that she now had a copy of the 1985 MOU but still wished to obtain the other information requested.
14. On 8 November 2006 the Commissioner's staff wrote to MOD and the complainant to begin the investigation.
15. On 5 December 2006 MOD told the Commissioner that the requested information was still being withheld, applying the exemptions under sections 27 and 43 of the Act. MOD said that some DTI files had been released to TNA in error and subsequently returned to DTI. MOD said that application of

the public interest test had concluded that, on balance, the information should not be disclosed. MOD pointed to a report by the Parliamentary Ombudsman of an investigation conducted during 2003/4 under the then non-statutory code of practice on access to official information, which had said that:

“The benefits of the Al Yamamah project to the United Kingdom economy are unarguably significant and I accept that there is a risk that any disclosure of information that may harm relations with Saudi Arabia could prejudice those benefits.” (case number: A.10/04 – Access to Official Information – July 2003 to June 2004).

16. On 12 December 2006 the complainant provided the Commissioner with copies of the 1985 MOU and a copy of a December 1986 letter from the then Chief Secretary to the Treasury which had originated from the file that DTI had lodged at TNA.
17. On 15 December 2006 the Attorney General announced that the Serious Fraud Office was discontinuing an inquiry it had been conducting for some time relating to the Al Yamamah deal with Saudi Arabia. He said that the decision had been made in the wider public interest, which had to be balanced against the rule of law. On the same day, the Prime Minister confirmed that he had advised the Attorney General that it was not in Britain's national interests for the Serious Fraud Office inquiry to continue.
18. On 19 December 2006, in response to his inquiry, DTI told the Commissioner that the 1985 MOU document had been among a set of miscellaneous files mistakenly transferred to TNA for public viewing in May 2006. DTI said that the document was only 21 years old and still contained sensitive commercial information whose disclosure would prejudice international relations. DTI said it had recovered its files on 26 October 2006; it did not propose to return the files to TNA, and their longer term future had yet to be decided. On 6 March 2007, MOD told the Commissioner that it has been unable to locate one appendix to the withheld 1973 MOU and confirmed that no other government department which held a copy of that MOU held a copy of the appendix either.

### **Findings of fact**

19. The Commissioner noted that the DTI papers containing the 1985 MOU had been transferred to TNA in error.
20. Despite the age of the MOUs, the Commissioner found that their release now would still be regarded by the UK government's Al Yamamah partner as a very serious breach of trust and mutual respect.
21. Some of the key Saudi Arabian participants in all of the original MOU negotiations still held high public office there when the request for information was made in March 2005.

22. The Commissioner has noted, and taken into account, the competing arguments with which he has been presented about the extent of the benefits of the Al Yamamah project to the UK economy. .

## Analysis

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### Procedural matters

23. MOD acknowledged that its handling of the request had not been fully in accordance with the requirements of the Act. There had been a delay in issuing a substantive response in breach of section 10 of the Act, with early correspondence not citing the relevant exemptions, and MOD acknowledged that the initial refusal notice could have expanded more in respect of the public interest aspect, in particular through acknowledging the arguments that supported disclosure of the information.

### Exemptions

#### Section 27

24. Under section 27(1) of the Act, information is exempt if its disclosure would, or would be likely to, prejudice relations between the UK and any other state, the interests of the UK abroad or the promotion and protection by the UK of its interests abroad. Under section 27(2) information is exempt if it is confidential information obtained from a state other than the UK. The text of those parts of section 27 is set out in the legal annex.
25. MOD told the Commissioner that the earliest MOU dated from 1973 (not 1972). It said that sensitive documents relating to the negotiation of the original Al Yamamah MOU had been published in a named UK newspaper on 28 October 2006. A researcher acting on behalf of the complainant had found files containing the 1985 MOU, which had been erroneously released to TNA and subsequently returned to DTI. MOD did not consider that the mistaken disclosure of this single MOU made a material difference either to the applicability of the exemptions or to the public interest considerations in MOD releasing the documents. MOD said that section 27 (International relations) and section 43 (Commercial interests) of the Act applied equally to the 1985 MOU document as to the other MOUs. MOD said that, when asked, the Saudi government had made it clear that it would view the intentional release of any of these documents, including any official publication of the 1985 MOU, as a serious breach of the confidentiality agreement written into the Al Yamamah MOUs.
26. In determining the engagement of the exemptions, and the balance of the public interest, the Commissioner has taken into account all the evidence available to him including: the evidence from the complainant, evidence from MOD, comments from DTI regarding the release and later retrieval of its file, and the report by the Parliamentary Ombudsman in 2004. He is satisfied that

disclosure of the requested information would, or would be likely to, prejudice:

- relations between the United Kingdom and another State;
- the interests of the United Kingdom abroad; and/or
- the promotion or protection by the UK of its interests abroad.

The Commissioner is also satisfied that the MOUs contained information obtained in confidence from the Saudi government during negotiations.

For these reasons, he is therefore satisfied that the relevant exemptions in section 27 are engaged in relation to the requested information...

## Section 27 – balance of the public interest

27. As regards the public interest, MOD said that there were significant commercial and economic benefits continuing to flow to the UK and the UK taxpayer from these agreements which would be jeopardised by the harm to bilateral relations that would stem from disclosure. MOD stressed the issue of breach of confidence, the high importance that the Saudi government attached to confidentiality, the substantial amount of work that Al Yamamah generated in the UK and the benefit from the British – Saudi defence cooperation programme in defence, counter-terrorism and related matters.
28. MOD referred to the Parliamentary Ombudsman's earlier conclusion that information exchanged between the UK and Saudi governments under Al Yamamah could be withheld and said that the adverse impact on the UK economy would be greater now than when the Parliamentary Ombudsman had investigated in June 2004 because of the progress of continuing negotiations.
29. The complainant told the Commissioner that MOD had recognised the argument for transparency in public affairs and for establishing that the Al Yamamah project had been run with propriety and regularity; however, she did not agree that the UK public could have confidence in the project. The complainant said that the most recent of the MOUs had been signed 17 years ago and that only residual work remained to be done on the projects. In the longer term more openness would benefit both UK and Saudi citizens. The complainant questioned the reported benefits to the UK economy of Al Yamamah and saw no evidence for them in the communications she had received from MOD. The complainant said that, in the longer term, greater openness would be in the public interest of both UK and Saudi citizens. The benefits to the UK economy claimed for the Al Yamamah project were questionable and the complainant pointed to studies which suggested that UK military exports as a whole were subsidised by the UK taxpayer. Placing information about the military deals with Saudi Arabia in the public domain would enable research by economists and others which would facilitate properly informed decision making. The complainant said that a third party report, dating from 2001, had concluded that a decrease in jobs in military industry would lead to increased employment in the UK, albeit at lower wages.

30. As regards the balance of the public interest, the Commissioner has noted that there are strong concerns on the part of the Saudi government to maintain high levels of reciprocal trust and mutual respect in bilateral relations. MOD understands that the Saudi government feel strongly that disclosure by MOD would be a serious breach of confidence on the part of the UK government. The Commissioner has noted that some of the senior members of the then Saudi government, who were key players in setting up the MOUs, still held high public office in Saudi Arabia in March 2005.
31. The Commissioner accepts the evidence put to him that any breakdown or damage that might have occurred in relations with the government of Saudi Arabia in March 2005 would have had an immediate, significant and direct impact on bilateral relations. He has also noted information from MOD about the benefits to the UK from the British - Saudi defence cooperation programme, along with the December 2006 UK government statements about where the balance of the UK's national strategic interest lies. He accepts that, although those statements post-date the March 2005 request for information, the case made out by the Prime Minister and the Attorney General in December 2006 concerning the public interest provides additional retrospective supporting evidence for the position as it was at March 2005 and the risks to the UK's national interest. These factors all point directly to the public interest in maintaining the section 27 exemptions. The Commissioner has received conflicting evidence from the parties as to the benefits of the Al Yamamah programme to the UK economy. He makes no determination of where the long term balance of the UK's national economic interest lies. But he does accept that the impact within the UK economy, including consequences for employment within sections of UK industry, strengthens, at least indirectly, the public interest argument for maintaining those exemptions
32. Taking the above representations from MOD together, and after weighing them against the arguments from the complainant in favour of disclosure, the Commissioner's decision is that the public interest in maintaining the exemptions outweighed the public interest in disclosing the information.

### **Section 43**

33. MOD relied also on the exemption in section 43 of the Act. The Commissioner accepts that this exemption may well be engaged but, having decided that the information has been properly withheld under section 27 of the Act, he has not gone on to consider the applicability of section 43.

### **The Decision**

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

## Steps Required

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35. The Commissioner requires no steps to be taken.

## Right of Appeal

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36. 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](mailto: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 4<sup>th</sup> day of April 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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



## Legal annex

### Relevant sections of the Act

#### Time for Compliance

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

#### International Relations

**Section 27(1)** provides that –

“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,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

**Section 27(2)** provides that –

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

#### Commercial interests

**Section 43(1)** provides that –

“Information is exempt information if it constitutes a trade secret.”

**Section 43(2)** provides 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).”

**Section 43(3)** provides that –

“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 the interests mentioned in subsection (2).”