

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 14 July 2008

**Public Authority:** Office of Government Commerce ("OGC")  
**Address:** Trevelyan House  
Great Peter Street  
London  
SW1P 2BY

### Summary

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The complainant requested access to all of the documents held by the Office of Government Commerce with regard to the ministerial direction issued by the Secretary of State for Defence to the Permanent Secretary of the Ministry of Defence on 30 July 2003, which concerned the order of 20 Hawk jet trainer aircraft.

The complainant was provided with a redacted letter from the OGC Chief Executive to the Deputy Prime Minister dated 11 July 2003 (the July letter). The public authority refused to disclose the withheld parts of this letter, initially citing sections 35 and 43 of the Freedom of Information Act 2000 and later claiming sections 26 and 29.

After a careful evaluation of the requested information, the submissions of the parties and the relevant provisions of the Act, the Commissioner's decision is that the public authority has not properly applied sections 26 and 35 of the Act. With regard to sections 29 and 43, the Commissioner found that the OGC had correctly applied the exemptions to parts of the information, but that it was in the public interest to partially disclose other parts of the withheld information. The Commissioner has therefore ordered the OGC to disclose to the Complainant a version of the July letter with fewer redactions than applied in the version already disclosed.

The Commissioner has also found that the public authority had breached section 17(1) of the 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 relevant date”) the complainant made a request to the Office of Government Commerce (OGC). He asked for information that *“relates to the decision by the “Secretary of State for Defence, Geoff Hoon to overrule Permanent Secretary of the Ministry of Defence, Sir Kevin Tebbitt, on the decision to order 20 Advanced Jet Trainer Hawk 128 Aircraft... Under the act, I would like to request complete copies of all documents held...regarding this ministerial direction [covering] briefing material, minutes and papers of meetings, emails, letters received and sent, memorandums of conversations, and any other relevant paperwork.”*

The complainant further requested a copy of a letter which he understood had been written by the Chief Executive of the OGC (CEO) to the Ministry of Defence (MOD) about the ministerial direction.

3. The OGC replied to the complainant’s request on 31 March 2005. It confirmed to the complainant that it did not hold any information specific to the ministerial direction, nor did it hold any letter from its CEO to the MOD about it. However, OGC informed the complainant that it did hold information relating to the purchase of the Advanced Jet Trainer Hawk 128 Aircraft (“Hawk jet”) and, on 21 April 2005, OGC provided the complainant with a redacted copy of a letter from its CEO to the Deputy Prime Minister (“DPM”) dated 11 July 2003 (“the July letter”). OGC refused to disclose the redacted portion of the July letter, citing the exemptions in sections 35(1)(a) and 43(2) of the Act.
4. On 24 May 2005 the complainant made a request to the public authority for an internal review of its decision to withhold the redacted parts of the July letter (“withheld information”). On 27 June 2005 the OGC confirmed that the internal review had taken place and that it was upholding its decision to withhold the redacted information.

## The Investigation

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### Scope of the case

5. The complainant was dissatisfied with the result of the internal review and, on 20 September 2005, he complained to the Commissioner under section 50 of the Act for a review of the decision to withhold the information redacted from the July letter.
6. Having reviewed the July letter, the Commissioner is satisfied that it relates to the ministerial direction and that it falls within the ambit of the complainant’s request

as it was made available to senior decision makers<sup>1</sup> and its content might have influenced the ultimate decision.

## Chronology

7. On 1 February 2006 the Commissioner asked OGC for an un-redacted copy of the July letter. In addition, the Commissioner asked OGC to provide further comments on its application of sections 35 and 43 of the Act to the information requested by the complainant. OGC replied on 24 February 2006. On 12 June 2007 the Commissioner asked OGC to provide further arguments in respect of its application of section 43. The OGC sent its response on 2 July 2007.
8. On 9 October 2007 the OGC informed the Commissioner that, following a further review of the complaint, it now wished to apply sections 26(1)(b) and 29 (1)(a) to parts of the withheld information.

## Findings of fact

9. Ministerial directions are given when a Minister directs an accounting officer, usually in writing, to proceed in accordance with his or her policy decision even though the accounting officer has formally notified the Minister of an objection to the Minister's proposed course of action because of concerns about propriety, regularity or value for money. When a ministerial direction is issued, departments are required to notify HM Treasury and send the relevant documents to the Comptroller and Auditor General of the National Audit Office (C&AG) to consider whether or not the matter should be referred to the Chairman of the Public Accounts Committee. The primary function of the National Audit Office (NAO) is to scrutinise public spending on behalf of Parliament. The NAO is independent of government.
10. On 30 July 2003 the Secretary of State for Defence (SoS) issued his ministerial direction to the Permanent Secretary, MoD (PUS) to proceed, subject to successful negotiations, with an initial order of 20 Hawk Jets (the "Hawk Direction"). On 5 August 2003, the PUS formally notified HM Treasury and the C&AG of the decision by the SoS. In his letter to the C&AG, the PUS confirmed that the Hawk Direction had been issued on value for money grounds and not on issues relating to regularity and impropriety (the NAO referral).
11. In October 2002, the UK Government launched its Defence Industrial Policy<sup>2</sup> (DIP). DIP was founded "*on the importance of equipping UK Armed Forces efficiently with the tools they require to meet the challenges they face*".<sup>3</sup> DIP was eventually superseded by the publication of the Defence Industrial Strategy (DIS) on 15 December 2005.

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<sup>1</sup> Copies of the July letter were sent to senior civil servants and politicians including: SoS (Defence), SoS (Treasury), the Foreign Secretary and the Chief Secretary to the Treasury, amongst others.

<sup>2</sup> Ministry of Defence Policy Paper No.5 Defence Industrial Policy

<sup>3</sup> At page 14.

## Analysis

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### Procedural matters

12. To establish if the OGC has correctly handled the complainant's request, the Commissioner has to determine whether or not the procedural obligations required by the Act have been correctly carried out. A full text of the statutory provision referred to is contained in the legal annex.
13. Section 17(1) provides that where the authority is relying on exemptions relevant to the applicant's request it must issue a Refusal Notice within 20 working days, specifying the exemptions concerned and how they apply to the requested information.
14. In its refusal notice of 31 March 2005 the OGC did not apply sections 26(1) (b) and 29 (1) (a) of the Act, both of which it only applied to the July letter much later. In failing to apply these exemptions in its refusal notice, the Commissioner finds that OGC has acted in breach of section 17 (1) of the Act.

### Exemptions

15. The OGC has applied sections 26, 29, 35, and 43 of the Act to withhold the information requested by the complainant. The Commissioner has given initial consideration to section 35 because the OGC has applied this exemption to all of the information from the July letter that remains withheld. The full text of the relevant sections of the Act referred to is contained in the legal annex.

### Section 35

16. Section 35 is a class based exemption which potentially exempts from release information relating to the formulation and development of government policy, Ministerial communications, and the provision of advice by any of the Law Officers, or any request for the provision of such advice, or the operation of any Ministerial private office. The only requirement for engaging this exemption is that the withheld information must fall within the class covered by the exemption: it is not necessary to demonstrate that prejudice would occur if the information were to be disclosed. However, this is a qualified exemption: this means that to successfully rely on its application, OGC must demonstrate that the public interest in maintaining the exemption outweighs the public interest in disclosing the redacted information.
17. The first task for the Commissioner is to establish whether or not the exemption is engaged. In coming to a view on that the Commissioner has borne in mind that, in the case of Department for Education and Skills vs. Information Commissioner and Evening Standard, ("DfES appeal")<sup>4</sup>, the Information Tribunal concluded that

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<sup>4</sup> Appeal number:EA/2006/0006.

the terms “relates to” and “formulation and development of policy” can be given a reasonably broad interpretation.

18. The OGC has argued that the information at issue relates to the question of government policy because it concerns the *“development of defence policy and its interaction with policy on public spending, in particular in relation to the development of HMG’s policy of securing and maintaining high technology defence capability in the UK.”* However, the Commissioner has noted that the issue of whether or not to purchase the aircraft forming the subject of this request has to be considered in the light of the DIP (see paragraph 11). It could therefore be argued that a decision about buying Hawk Jets for use as the Advanced Jet Trainer relates more to the implementation of the DIP rather than to the formulation and development of policy as referred to in the exemption.
19. However, in the DfES appeal, the Tribunal acknowledged that the *“distinction between formulation/development on the one hand and implementation on the other will prove to be a very fine one in some cases since implementation itself usually spawns policies”*. And, in support of its argument that section 35 should be applied to all of the withheld information contained in the letter, MOD has said that defence policy should not be regarded as one *“that is formulated and then enacted but rather it is a policy under constant review so that it is flexible to the complex needs of the UK’s defence industry and the UK’s armed forces.”* The Commissioner accepts the point made by the Tribunal that, in some cases, the distinction between formulation/development and implementation will be a very fine one: indeed, in some cases, perhaps a distinction without a difference. However the Commissioner is willing to accept, particularly on the basis of his consideration of the actual material contained within the withheld parts of the July letter, that section 35 has been correctly applied in this instance and that the information sought does relate to the formulation and development of policy and therefore legitimately falls within the terms of the exemption. On that basis, the Commissioner can now proceed to consider the public interest considerations relevant to the redacted information.

### **Public interest test**

20. In his approach to the competing public interest arguments in this case, the Commissioner has again drawn on the Information Tribunal’s decision in the DfES appeal referred to above, where the Tribunal helpfully laid down a set of principles that should guide the weighing of the public interest in relation to cases where the section 35 exemption applies; these principles have been carefully considered, and those relevant to this complaint have been adopted.
21. The complainant’s view is that the public interest lies in the disclosure of the redacted portion of the July letter because it would promote accountability and transparency in the spending of public money and in the decisions taken by public authorities. In his email to the OGC of 1 March 2005 the complainant stated that *“a fundamental function of the [Act] is to explain to the public how and why a substantial amount of taxpayers money is being spent. In this case, there are still unexplained aspects of the decision to award the contract to BAE, rather than a rival bidder...it is clear that there was no proper tendering process for this*

*contract [and] the public is entitled to know more about why this is the case". The complainant also said that "a full airing of the circumstances surrounding this ministerial direction will help to promote public confidence in the belief that public money is being protected and that the system for protecting public money is working".*

22. In making its judgement on the question of where the public interest might rest, OGC recognised several factors weighing in favour of disclosing the requested information, particularly that:
- (i) the promotion of greater transparency in all areas of policy development would make government more accountable to the electorate and ensure that public money was used effectively,
  - (ii) it would reflect the considerable public interest in being able to assess the quality of advice given to Ministers, especially given the significant amount of public money involved in the contract award to BAE,
  - (iii) public knowledge of the ministerial direction would enable the public to understand the reasons why the ministerial direction on the Hawk jet had been required,
  - (iv) it would meet the general public interest in the proper scrutiny of government actions and inform the public debate to that end, and
  - (v) increased knowledge of the operations of government would promote the public contribution to the policy making process.
23. OGC also identified a number of factors which supported withholding the information under section 35. In particular, that:
- (i) there was a need for Ministers and officials to be able to conduct rigorous and candid risk assessments of their policies without there being any premature disclosure which might close off better options, and
  - (ii) the disclosure of interdepartmental considerations of the AJT options might undermine the collective responsibility of government because *"opponents of particular policies would use divisions to their advantage and seek to play one department off against another. This would have a damaging effect on the operation of government."*

Having weighed up these respective considerations it was the public authority's eventual decision that, overall, the public interest operated in favour of withholding the information under this exemption.

24. The Commissioner acknowledges the public interest arguments set out above. After a careful evaluation of these arguments the Commissioner has concluded that, subject to his subsequent findings on the application of sections 26, 29 and 43 of the Act, the balance of the public interest in relation to this particular exemption falls in favour of disclosure of the information sought. This view is

based on his belief that any potential harm to the formulation and development of the government's defence industrial policy would not be outweighed by the public interest in disclosure.

25. The Commissioner acknowledges that the withheld information contains frank and candid comments and views. However, the Commissioner also believes that the prospect of release into the public domain should drive officials to produce advice of a high standard which should be able to withstand public scrutiny. He believes that, when promoting and defending a particular policy decision (such as the issuing of a Ministerial Direction), it is beneficial if the public has a fuller understanding of the preceding discussion and advice in order to better gauge the thoroughness and robustness of the government policy formulation process. Additionally, as a senior civil servant, the CEO would regard himself as under a duty to make available for consideration by his Minister all of the information and experience at his disposal which might affect any decision that might need to be taken, in this case the possible purchase of the Hawk jet. This duty would unquestionably include the provision of honest and impartial advice. In the Commissioner's view civil servants would be in breach of their duty, and damage their integrity as servants of the Crown, if they deliberately withheld relevant information from their Minister or gave their Minister advice other than the best that they were capable of providing. In addition, the Commissioner is aware of judicial support for the view that the possibility of future publicity should act as a deterrent against advice which is specious or expedient.<sup>5</sup>
26. The Commissioner has also considered OGC's further argument that the convention of collective responsibility should be preserved due to the detrimental effects that disclosure of inter-departmental considerations would have on this convention. The Commissioner fully recognises the constitutional significance of collective cabinet responsibility. Equally, however, the requirements of the Act passed by Parliament call for some adjustment of thinking within government and elsewhere about the interpretation and application of this principle. For example, the strength of the convention lies primarily in the political commitment of all Ministers to a government decision once it has been made. It is less powerful in relation to any personal or departmental differences of view or emphasis which might arise during the decision-making process. The Commissioner believes that this convention should not be used to create or reinforce the fiction that Ministers have always been of a single collective opinion. The public would not expect such a situation and, indeed, would be more likely to be concerned by the suggestion that there had been neither rigorous debate nor differences in opinion before complex government decisions were made. A central argument for the freedom of information legislation is to expose decision-making processes to greater transparency, unless there is a good reason for confidentiality. Such greater transparency – which may indeed sometimes reveal differences of view or emphasis – need not inhibit frankness and candour. In this case, however, the Commissioner does not believe that disclosure of the information would create any real risk. He does not accept that the ability of ministers to speak with frankness and candour would be adversely affected by the disclosure of the information in dispute in this case.

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<sup>5</sup> Justice Mason in *Sankey v Whitlam* (1978) 142 CLR1

27. A further consideration is of course the fact that the information request was made nearly two years after the Ministerial direction was issued. When considered against this background the Commissioner believes that the sensitivity and confidentiality of the comments contained within the July letter had then diminished to a level sufficient for disclosure. Therefore, given how much time had elapsed before the request was made, the Commissioner does not believe that the need for a private thinking space and the maintenance of the convention of collective cabinet responsibility constitute persuasive arguments for withholding the July letter.
28. The Commissioner also recognises, given the size of the Hawk jet contract, that there is an inherently strong public interest in public authorities being transparent in the policy decisions they take in order to promote accountability in the spending of public money. If the background information to the decision making process is made public, there is a strong argument that such increased transparency will improve the quality of future decisions and enable the public to assess if public authorities are acting appropriately. In particular, disclosure of the July letter would enable the public to assess the quality of advice and other issues considered by the government prior to the Hawk Direction.
29. The public authority additionally argued in this case that, *“the public interest in how public money is spent is met to some extent by the fact Parliament has established a process whereby the Comptroller and Auditor General and the Public Accounts Committee have oversight on spending pursuant to a Ministerial Direction”*. The Commissioner does of course recognise the role of the NAO and others in taking a general overview of matters relating to government expenditure. But, while recognising the existence of those other safeguards, the Commissioner is nevertheless of the view that this does not mean that there is therefore no public interest in the release of any evidence that may exist in relation to a significant item of public expenditure and allowing the public to draw its own conclusions. On that basis, the Commissioner is not inclined to accept the argument that the presence of other safeguards is of itself a reason for not putting this information into the public domain.
30. Finally, the Commissioner notes that it is in the public interest to disclose information where this would help further the understanding of and participation in the public debate of issues of the day. There is an interest in increasing public understanding of how public authorities' decisions affect them and, where appropriate, in allowing the public to challenge these decisions. The Commissioner considers that for the public to participate in a debate then, for beneficial input to occur, the options being considered should be known. The Commissioner notes that there remains a considerable degree of public interest in relation to the Hawk Direction and, consequently, that there is a strong public interest in providing information to the public about the various issues being considered prior to the Hawk Direction being issued.
31. The Commissioner therefore considers that, subject to his findings on the prejudice based exemptions applied by the OGC, disclosure of the July letter would result in effective public scrutiny of the policy making process at the very



highest levels of government. The Commissioner also considers that this increased transparency should help improve the quality of future decisions on government defence policy, the related public spending policy and their inter-relationship. Finally, in his view, disclosure would contribute to enabling the public to assess whether the MOD and the government have acted appropriately. Accordingly, the Commissioner is satisfied that the public interest in maintaining the section 35 exemption does not outweigh the public interest in the OGC disclosing the information.

### The prejudice-based exemptions

32. With regard to sections 26, 29 and 43, the OGC has failed to identify the specific parts of the July letter that were applicable to each of these prejudice exemptions despite a clear request to do so. Therefore, the Commissioner has had no option but to evaluate the application of each of these prejudice based exemptions against those parts of the July letter that he considers most relevant to the particular exemption concerned.
33. In dealing with the issue of prejudice, the Commissioner has applied the test of 'likely to prejudice' as established by Mr Justice Mundy in the case of *R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073*, which was followed by the Information Tribunal in the case of *John Connor Press Associates Limited and The Information Commissioner*<sup>6</sup> where the Information Tribunal interpreted the expression 'likely to prejudice', within the context in this case of the section 43 exemption, as meaning that the chance of prejudice being suffered should be more than hypothetical or a remote possibility; in effect, there must be a real and significant risk. The Tribunal in that case indicated that the degree of risk must be such as to show that there '*may very well*' be prejudice<sup>7</sup>.
34. In *Hogan and Oxford City Council -v- The Information Commissioner*<sup>8</sup>, the Information Tribunal applied Mr Justice Mundy's test to section 31(1) of the Act. In the above appeals, the Information Tribunal stated that "*...there are two possible limbs on which a prejudice based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not...The s31(1) prejudice is not restricted to 'would be likely to prejudice'. It provides an alternative limb of 'would prejudice'. Clearly this second limb of the test places a much stronger evidential burden on the public authority to discharge.*"

The Information Tribunal also confirmed that, "an evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice."

<sup>6</sup> EA /2005/0005),

<sup>7</sup> This test of "likely to prejudice" has also recently been confirmed by the Information Tribunal in *OGC v The Information Commissioner EA/2006/0068 & 0080* paragraphs DFES 42 – 48).

<sup>8</sup> EA/2005/006, EA/2005/00300

## Section 26

35. Section 26 exempts information if its disclosure would, or would be likely to, prejudice the capability, effectiveness or security of the UK's armed forces or its allies.
36. OGC has advanced detailed arguments that the information relates to BAES' position as a major supplier of goods and services to the Armed Forces and its commercial relationship with the MOD.
37. The Commissioner needs first of all to establish whether this exemption can be appropriately applied to the information at issue. The Commissioner is not, in this case, satisfied that it can. The information sought here relates to a Ministerial Direction. This was issued because concerns had been expressed by the PUS about a proposed contract in respect of its value for money aspects. The Commissioner notes, in that context, that MOD has also cited exemptions 29 and 43 of the Act in relation to the withheld information. These deal, respectively, with the economy and with matters of commercial confidentiality, topics that identify much more closely in the main with the kind of issues with which the Ministerial Direction was concerned and, indeed, which form the essential subject matter of many of the points set out by MOD in the previous paragraph. It is the Commissioner's view these sections of the Act, which he goes on to consider below, are perhaps more appropriately applied to the information at issue than section 26, which relates more specifically to matters of defence and physical security. The Commissioner is not therefore satisfied that release of the information sought would cause prejudice of the kind envisaged under this exemption: the exemption is therefore not engaged. On that basis there is no requirement for the Commissioner to consider the public interest test.

## Section 43

38. Section 43(2) of the Act exempts information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including those of the public authority holding it.)
39. OGC has argued that release of the commercial information contained in the July letter would significantly impair the relationship of the Ministry of Defence (and other government departments) with industry due to the sensitive nature of the information concerned. In its view major contractors would soon become aware that commercially sensitive information had been released into the public domain and they might, as a result, choose to withhold such information in the future, which would be both detrimental to the procurement process and reduce the ability of government departments to negotiate effectively to secure best value for money.
40. The Commissioner has considered this argument carefully but does not concur with it. His view is that, following the implementation of the Act, persons or companies contracting with public authorities should now learn to expect that their commercial dealings will be subject to a high level of public scrutiny and that this

should be seen as part of the price to be paid when dealing with MOD (or, indeed, with other public sector authorities).

41. However after applying the prejudice tests, the Commissioner is nevertheless satisfied that disclosure of the information falling within this exemption would, or would be likely to, prejudice the commercial interests of MOD. The Commissioner has noted that the information sought includes various suggested strategies and recommendations for handling MOD's relationship with BAES. The Commissioner accepts that the specific issue under consideration at the time of the Ministerial Direction was long resolved by the time the request was made to MOD (March 2005): the transaction had been agreed and the broad details put into the public domain. However, MOD and other Government departments will continue to enter into contracts with companies in the private sector. The Commissioner believes that disclosure of this kind of information would be detrimental to the MOD's bargaining position in any such future dealings, not just with BAES but with other companies. It could lead to a reduction in MOD's ability to obtain best value for money from the company concerned. Accordingly the Commissioner is satisfied that, in releasing the information, there is a real and significant risk of prejudice to the commercial interests of the MOD.
42. OGC has also presented commercial prejudice arguments on behalf of BAES and Aermacchi, an Italian aircraft manufacturer. Generally, the Commissioner will only consider third party arguments that have been presented by the companies themselves. In that context the Commissioner has noted that, in the case of *Derry City Council v Information Commissioner*<sup>9</sup>, the Information Tribunal were also unwilling to speculate on the damage to the commercial interests of the third party (in this case Ryanair) based purely on the representations of the Council. However, given the particular circumstances of this case, the Commissioner is on this occasion willing to consider the arguments presented by OGC on behalf of BAES because:
- (i) the withheld information does not involve contractual information of which BAES and Aermacchi have existing knowledge. As will be stated later in this Decision Notice, the redacted information is a frank assessment of various issues relevant to the procurement of the Hawk jet. Therefore, the Commissioner believes that it is not realistic to expect these companies to have the opportunity to comment on the disclosure of the withheld information.
  - (ii) the Commissioner recognises that, in practice, there will be situations where a public authority is in a position to provide informed comment about the commercial impact of disclosure on a contractor. The OGC could claim to have sufficient expertise in this area to be able to provide reliable evidence of the potential commercial prejudice to the companies of disclosing certain Information.
43. OGC has argued that release of the withheld information would, or would be likely to, prejudice the commercial interest of BAES because it could weaken the

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<sup>9</sup> EA/2006/0014

company's competitive position. In its view such information could be used by BAES's competitors: disclosure would therefore be likely to prejudice the commercial interests of the company.

44. The Commissioner recognises that BAES is operating in a highly competitive market and that disclosure of some of the commercial information contained in the July letter might enable competitors to use that information to the commercial disadvantage of BAES. This disadvantage would very likely damage both the company's reputation and its ability to compete in the export market for advanced jet trainers and other defence products. Such a situation could lead, for example, to the further loss of sales opportunities, loss of market share, and a loss of profits. The Commissioner is therefore satisfied that disclosure of the redacted information would, or would be likely to, prejudice the commercial interest of BAES.
45. OGC also argued that releasing this kind of information would, or would be likely to, prejudice the commercial interests of Aermacchi because it could weaken its competitive position for the same reasons that it had put forward in the case of BAES. However, after the application of the prejudice tests, the Commissioner is not satisfied that OGC has convincingly demonstrated that disclosure of similar information would, or would be likely to, prejudice the commercial interest of that company as the Commissioner believes that the information relating to Aermacchi within the July letter is of insufficient gravity to merit a finding that disclosure would result in a real and significant risk of prejudice to the commercial interest of the company.
46. Notwithstanding this finding, the Commissioner remains satisfied that section 43 is engaged in respect of the withheld information because he considers that disclosure would, or would be likely, to prejudice the commercial interests of both the MOD and BAES.

### **Public interest test**

47. Section 43 is a qualified exemption and is therefore subject to the public interest test. The Commissioner has decided to deal with the public interest considerations in relation to this exemption in conjunction with section 29. This is because there is a clear link between the potentially detrimental effect of both of these exemptions, specifically the effect on the economy in general if commercial damage were to be caused to BAES. It should be noted that, by taking this approach in this specific instance, the Commissioner is not intending to set any kind of precedent: in the vast majority of cases the public interest arguments in respect of separate exemptions will be clearly different.

### **Section 29**

48. Section 29 (1)(a) of the Act exempts information if its disclosure would, or would be likely to, prejudice the economic interest of the UK or of any part of the UK.
49. OGC has argued that disclosure of the commercially confidential information in the July letter would, or would be likely to, weaken the economic interests of the

region of Brough in East Yorkshire because BAES *“is by far the major employer in Brough. Disclosure...could have an impact on future sales of Hawk 128 and would thus be likely to prejudice the economic interest of the area”*. The public authority advanced additional arguments regarding potential prejudice more widely to the UK economy.

50. The Commissioner recognises the nature of the highly competitive world-wide market within which BAES is operating. He accepts that winning or losing business to competitors would be very likely to produce adverse effects on the company's employees, the local economy in general and to BAES sub-contractors. He also accepts that a loss of, or a reduction in, BAES's export sales potential could damage UK exports as information relating to the wider impact on the UK economy might be used by some or all of those foreign competitors to the disadvantage of BAES. In addition, foreign governments that may intend to purchase the Hawk jet might be dissuaded from placing orders for it, a situation that would probably result in the loss of potential UK export earnings which, in turn, would affect UK's balance of trade and payment position.
51. The Commissioner is therefore satisfied that the above state of affairs would be likely to have detrimental consequences for the economic health of the nation. Consequently, the Commissioner is satisfied that the disclosure of information in the July letter relating to the economic interest of Brough specifically, and the UK more widely, would, or would be likely to, prejudice those economic interests. Accordingly, the Commissioner is satisfied that section 29 is engaged in respect of such information.

#### **The public interest test applicable to sections 43 (2) and 29 (1)(a) of the Act**

52. As set out in paragraph 47, the Commissioner has considered the public interest arguments with respect to these two exemptions together.
53. The complainant has argued that the greater public interest lies in disclosure because of the public interest in transparency in the accountability of public funds, and in the government procurement process. In his view, disclosure of the redacted information *“would explain to the public why the government had awarded a contract worth £3.5 billion without a proper tender”*. The complainant also states that *“there is a greater public interest in explaining why the decision was made, than maintaining this commercial confidentiality. With the contract awarded, I believe that the sensitivity of the information has decreased, compared to the period before or just after the award. It must surely be a basic function of the freedom of information act to explain procurement decisions, rather than attempt to protect information whose commercial sensitivity has decreased”*.
54. In making its judgement on where the public interest lay, OGC identified several public interest factors in favour of disclosing the redacted information, for example:
  - (i) the promotion of greater transparency in the accountability of public funds.

- (ii) publication of the ministerial direction would enable a greater understanding as to why the ministerial direction on the Hawk jet was needed.
  - (iii) the general public interest in proper scrutiny of government actions and to inform the public debate to this end.
55. In deciding, however, that the public interest favoured withholding the information, OGC said that: *“Firstly, there is a strong public interest in information regarding the spending of public money...In the balance, the very strong public interest in information regarding the spending of public money reflects the public interest in maintaining the ability of government to make effective decisions regarding the spending of public money, taking into account wider Government policy issues. Disclosure would be to the significant detriment of this strong public interest and as such the balance lies in non-disclosure”*
56. The Commissioner acknowledges the arguments submitted by the parties and has considered carefully these competing views of the public interest. He has concluded that, on balance, the public interest lies in a partial disclosure of the withheld information in the July letter relating to commercial and economic matters. In reaching this conclusion the Commissioner has considered the competing public interest arguments against disclosure:
- (i) the timing of the complainant’s request,
  - (ii) the nature of the sensitive commercial and economic information contained in the withheld information,
  - (iii) the fact that the July letter was written by the CEO to the DPM by the OGC, i.e. the office responsible for improving value for money and transforming government procurement policies.
  - (iv) the fact that the Hawk jet was on the relevant date still being marketed and sold to other countries,
57. To facilitate the partial disclosure of this information, the Commissioner has therefore edited the July letter to remove from it all of the information which he considers that it is not in the public interest to disclose. This edited version of the July letter is contained in Annex 2 of this notice and will be provided exclusively to the public authority.
58. The Commissioner’s conclusions on the partial disclosure of this information is based on the following considerations.

### **Redacted Information**

59. With regard to the information that he has redacted, the Commissioner believes that the potential harm that would be caused by its release would outweigh the public interest in disclosure. In reaching this conclusion the Commissioner is

mindful of the strong public interest in promoting openness and transparency in the procurement processes for awarding government contracts and of the importance of the arguments listed in paragraph 63 below in relation to information which he believes should be released.

60. However, after close consideration of the potential detrimental effects of disclosure, the Commissioner believes that the commercial sensitivity and confidentiality of the redacted information in the period between July 2003 and the relevant date remained at a sufficient level to justify non-disclosure. In addition, the Commissioner believes that the essential purpose of the ministerial direction process is the recognition that an effective government will from time to time need to take decisions that will be controversial. The Hawk Direction actually highlights the fact that major procurement decisions are often influenced by considerations other than the need solely to achieve best commercial value. For example, one of the stated objectives of the DIP is to *“maximise the economic benefit to the UK from [its] defence expenditure, a healthy and globally competitive defence industry and the development of a high-value technologically skilled industrial base, consistent with Government’s wider manufacturing strategy”*.(Paper Number 5, Defence Industrial Policy (www.mod.uk)) Therefore, the Commissioner finds that the desirability for openness and transparency to be gained by releasing the redacted information is not sufficient to outweigh the harm that would be caused, in this case, to BAES, the local economy in Brough and the wider UK economy.
61. Consequently the Commissioner finds that, in all the circumstances of this case, the public interest in maintaining the exemptions in sections 29 and 43 outweighs the public interest in disclosing the redacted information.

### **Non-redacted Information**

62. With regard to the information that has not been redacted, the Commissioner believes that the potential harm that would be caused by its release would not outweigh the public interest in disclosure.
63. The Commissioner considers that, due to the substantial size of the contract awarded to BAE, the disclosure of the non-redacted information would enable the public to better understand the value for money issues, analysis and discussions that might explain why the Hawk Direction was issued. In addition, the Commissioner believes that disclosure would promote greater openness and transparency. In his view, this increased transparency will:
- improve the quality of future decisions and enable the public to better assess whether the MOD acted appropriately in the eventual decision to purchase the Hawk jet.
  - reassure the public that all relevant information had been taken into account in the decision to place the order for the Hawk jets.
  - enable the public to understand the value for money issues, analysis and discussions that would explain why the Hawk Direction was issued.

64. Therefore, in the particular circumstances of this case, the Commissioner considers that the desirability for openness and transparency through releasing the non-redacted information, and the benefit to the public interest in this material being made available, is sufficient to outweigh the harm that would, or would be likely to, be caused by its disclosure. Accordingly the Commissioner is satisfied that the public interest in maintaining the sections 29 and 43 exemptions does not outweigh the public interest in the OGC disclosing the non-redacted information.

## The Decision

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65. The Commissioner's decision is that the public authority dealt with the following elements of the complainant's request for information in accordance with the Act:

With regard to the redacted information, the Commissioner's decision is that the public authority has validly applied the exemptions provided at sections 29(1)(a) and 43 (2) of the Act.

66. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

The Commissioner has decided that the public authority did not comply with section 17 of the Act in that its refusal notice failed to notify the complainant of its application of sections 26 (1)(b) and 29(1)(a), in accordance with the Act.

With regard to the non-redacted information, the Commissioner's decision is that the public authority has not correctly applied the exemptions provided at sections 35 (1)(a), 26 (1)(b), 29(1)(a) and 43 (2) of the Act.

## Steps Required

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67. The Commissioner requires the public authority to take the following step to ensure compliance with the Act:

the redacted version of the July 2003 letter contained in Annex 2 of this notice should be disclosed to the complainant within 35 days of the date of this notice.

68. The Commissioner requires that no further steps need be taken in respect of the breach of the Act identified in paragraph 66 because this Decision Notice has effectively advised the complainant of OGC's application of sections 26 (1)(b) and 29(1)(a) of the Act to the requested information.



## Failure to comply

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69. Failure to comply with the step 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

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70. 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 14th day of July 2008**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## LEGAL ANNEX

### Refusal Notice

**Section 17(1)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

### Defence

**Section 26(1)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (b) the capability, effectiveness or security of any relevant forces.”

### The economy.

**Section 29(1)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the economic interests of the United Kingdom or of any part of the United Kingdom, or

### Formulation of Government Policy

**Section 35(1)** provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,

**Commercial interests.**

**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).”