

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 August 2010

Public Authority: UK Trade & Investment
Address: Kingsgate House
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London
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Summary

The complainant made a freedom of information request to UK Trade and Investment for a number of documents relating to Iraq and its oil industry. In response the public authority released the documents in a redacted form. The complainant challenged the public authority's decision to redact information from two of the documents under the exemptions in section 27(1)(a) and (d) (International relations); section 40(2) (Personal information); section 41(1) (Information provided in confidence) and section 43(2) (Commercial interests). The Commissioner has investigated the complaint and has found that section 27(1)(a) was engaged and the public interest in maintaining the exemption outweighed the public interest in disclosure; that section 41(1) was engaged for most of the information to which it had been applied and that section 40(2) was only partially engaged. The Commissioner did not look at section 27(1)(d) or section 43(2) as he was satisfied that other exemptions applied. The Commissioner also found that in its handling of the request the public authority breached section 1(1)(b) of the Act (General right of access to information held by public authorities); section 10(1) (Time for compliance) and section 17(1) (Refusal of a request). The Commissioner requires the public authority to provide the complainant with the information which is not exempt under section 41(1) or section 40(2) within 35 calendar days of the date of this notice.

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 22 June 2009 the complainant wrote to the public authority to request information contained in seven specific documents relating to oil matters regarding Iraq.
3. The public authority responded to the complainant's request on 15 August 2009 when it provided him with copies of five documents, subject to a number of minor redactions. Two documents were withheld in their entirety. The first of these was labelled 'Iraq: BP and other oil matters' ('the BP document') which the public authority explained was being withheld under 27(1)(a) which provides for an exemption where disclosure would, or would be likely to, prejudice relations between the United Kingdom and any other state, and section 27(1)(d) which provides for an exemption where disclosure would or would be likely to prejudice the promotion or protection by the United Kingdom of its interests abroad. The second document was labelled 'Meeting with Shell: 24 May 2006' ('the Shell document') which the public authority explained was being withheld under section 41 and section 43(2). Section 41 provides for an exemption where disclosure would constitute an actionable breach of confidence and section 43(2) provides for an exemption where disclosure would, or would be likely to, prejudice the commercial interests of any person. For each qualified exemption the public authority concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
4. On 27 August 2009 the complainant wrote to the public authority to ask that it undertake an internal review of its handling of the request in respect of the two documents which were withheld in their entirety. The complainant now provided a detailed submission to support his view that the information in the two documents should be disclosed.
5. The public authority presented the findings of its internal review on 20 October 2009. As regards the BP document, it now said that after consultation with 'interested third parties' it had concluded that some information could be disclosed. However, it maintained that some information should remain redacted under section 27(1)(a) and (d) because it relates to 'wider topics than BP and...although the events happened several years ago they remain part of ongoing sensitive discussions'. It argued that disclosure could affect the UK's relations

with the Iraq government and that the public interest favoured maintaining the exemption.

6. The public authority also released some further information contained within the Shell document. However, most of the information continued to be withheld under the exemptions in sections 40, 41 and 43(2). The public authority explained that the names of individuals had been withheld under section 40(2) of the Act as they constituted the personal data of third parties and in its opinion disclosure would breach the first data protection principle which requires that data be processed fairly and lawfully and in particular that data must not be processed unless one of the conditions in schedule 2 of the Data Protection Act 1998 is met. The public authority's view was that disclosure of the names would not be fair and would not meet a schedule 2 condition.
7. As regards the information withheld under section 41, the public authority explained that the information had been passed to it in confidence and it had agreed to treat the information as such. It said that information which was purely factual had been provided but that the remaining information originated from third parties and related to a commercial project. It confirmed that it remained commercially sensitive and was not available by other means. It said that it was clear that it could face a breach of confidence action if the information was released.
8. Section 43(2) had also been applied and the public authority explained that after taking advice from other government departments and the UK companies featured in the information, it considered that the information remained commercially sensitive and negotiations were continuing on the proposals mentioned in the information. It outlined the factors it had taken into consideration when balancing the public interest which it concluded favoured maintaining the exemption.

The Investigation

Scope of the case

9. On 10 November 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to redact information from the BP document and the Shell document. The complainant provided the Commissioner with detailed representations in support of his complaint. These can be summarised as follows:

- For the 'BP document' – section 27 was incorrectly applied.
- For both documents – section 40 was incorrectly applied.
- For the 'Shell document' – section 41 may have been incorrectly applied.
- For the Shell document – Section 43(2) was incorrectly applied.
- For both documents – the public interest test was not properly carried out.
- For both documents – the public interest in releasing the information outweighed the public interest in withholding the information.

Chronology

10. The Commissioner first wrote to the public authority with details of the complaint on 27 November 2009. At this point the Commissioner asked for un-redacted copies of the withheld information and asked the public authority to be specific about where each exemption was being applied.
11. The public authority provided the Commissioner with copies of the withheld information on 3 December 2009.
12. On 9 April 2010 the Commissioner wrote back to the public authority with some supplementary questions on its application of the different exemptions. As regards the BP document the Commissioner asked the public authority to further explain why sections 27(1)(a) and 27(1)(b) were engaged, and to elaborate on its reasons for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure. The Commissioner also asked for further details on the nature and importance of UK/Iraq relations at the time of the request.
13. For the Shell document the Commissioner asked the public authority to clarify if section 41 and 43 were both being applied to the whole document or to specific parts and to further explain why each exemption was engaged. The version of the Shell document which was released to the complainant had referred to Shell's 'Gas Masterplan' for Iraq. The Commissioner asked for some background information on this and clarification on the extent to which this 'Masterplan' was a commercial enterprise.

14. The Commissioner also noted that the public authority had withheld the names of individuals featured in the documents under section 40(2) on the basis that disclosure would breach the first data protection principle. The Commissioner now asked the public authority to explain why disclosure would breach the first data protection principle and in particular what expectation the individuals would have that their names would not be revealed. In the case of the names of Government officials, the Commissioner asked for details of their seniority.
15. The public authority responded to the Commissioner on 24 May 2010 providing answers to his queries.

Findings of fact

16. Royal Dutch Shell announced in 2005 that it was supporting the Iraqi Oil industry in a number of different ways including co-operating with Iraq's Ministry of Oil on producing a Gas Masterplan, to set up a blueprint for the development of Iraq's natural gas sector.¹
17. In September 2008 Shell and the Iraq Ministry of Oil entered into a Heads of Agreement in relation to their joint venture to reduce gas flaring in the South of Iraq and to gather any gas for utilisation in the domestic and export markets. This document was subsequently published on the internet.²
18. Following the invasion of Iraq in 2003 the Coalition Provisional Authority assumed responsibility for governing the country. In 2005 sovereignty passed to the Iraq Interim Government to allow for national elections to take place.

¹http://www.shell.com/home/content/media/news_and_library/press_releases/2005/field_study_in_iraq_14012005.html

² <http://www.al-ghad.org/wordpress/wp-content/uploads/2008/11/shell-hoa-english.pdf>

Analysis

19. Full texts of the relevant statutory provisions referred to in this section are contained within the legal annex.

Exemptions

Section 27– International relations

20. The public authority has applied both section 27(1)(a) and section 27(1)(d) to the information redacted from the BP document. Section 27(1)(a) provides that information is exempt if disclosure would, or would be likely to, prejudice the international relations between the UK and any other state. Section 27(1)(d) provides that information is exempt if disclosure would, or would be likely to, prejudice the promotion or protection by the United Kingdom of its interests abroad. As sections 27(1)(a) and 27(1)(d) are technically two different exemptions the Commissioner has considered them separately.

Section 27(1)(a)

21. The Commissioner has first considered whether section 27(1)(a) is engaged. The public authority has said that section 27(1)(a) applies as disclosure would be likely to prejudice the UK's relations with Iraq. This is because, it argues, the Iraqi government would not want the information to be released.
22. In considering the nature of prejudice which this exemption is designed to prevent, the Commissioner is guided by the following comments of the Information Tribunal in respect of section 27:
23. "...we would make clear that in our judgement prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage."³
24. Whilst the information mentions BP interests in Iraq, it also touches on other issues relating to Iraqi oil industry and the public authority has stated that these issues remain sensitive. It suggests that disclosure of this information at the time of the request would have met with an

³ Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence [EA/206/0040], para. 81

unfavourable reaction from the Iraqi government which in turn would have made the UK's bilateral relations with Iraq more difficult. The Commissioner accepts that if disclosure would, or would be likely to, make relations with Iraq more difficult then the prejudice will be sufficient for the exemption to be engaged.

25. In considering the likelihood of this prejudice occurring, the Commissioner notes that the public authority has not explicitly said if disclosure would, OR would be likely to, prejudice international relations. In light of this the Commissioner considers it appropriate to apply the lesser test, that is to say the exemption will be engaged where disclosure would be likely to prejudice international relations. This approach has found support in the Information Tribunal when it stated:

"...in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level."⁴

26. The Information Tribunal has also considered the meaning of 'would be likely to prejudice' and found that for this to apply:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."⁵

27. This in turn follows the judgement of Mr Justice Munby in the High Court in which the view was expressed that:

"Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."⁶

28. In this case the Commissioner is satisfied that the likelihood of prejudice occurring is sufficient to engage the exemption. Whilst it is difficult to provide evidence of how a country might react to disclosure, the Commissioner notes that when deciding to apply the exemption the public authority consulted the Foreign & Commonwealth Office who explained that the information remained sensitive at the time of the

⁴ McIntyre, para. 45.

⁵ John Connor Press Associates Ltd v Information Commissioner [EA/2005/0005], para. 15.

⁶ R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 Admin

request and whose opinion it was that the Iraqi government would not want the information to be disclosed.

29. The Commissioner must be careful not to reveal the content of the withheld information and therefore it is difficult to elaborate on exactly why the Iraqi government would react unfavourably if the information were disclosed. However, the Commissioner has reviewed the information and understands that the issues discussed were still the subject of debate within Iraq at the time of the request and that individuals featured in the information are still prominent within Iraqi politics. With this in mind it is not reasonable to assume that the Iraq government would not want the information, or the names of officials linked to the information, to be released at this sensitive time.
30. For these reasons the Commissioner has accepted that section 27(1)(a) is engaged.
31. In his submission the complainant argued that the passage of time had changed the prejudice assessment because whilst the UK was an occupying power when the information was created, at the time of the request responsibility for governing Iraq had passed to the Government of Iraq following national elections in 2005. The complainant also suggests that issues regarding the Iraqi oil industry have themselves progressed in the period between the information being created and the date of the request. The Commissioner has already explained that having reviewed the information he is satisfied that the information remained sensitive at the time the complainant submitted his request. As regards the nature of UK – Iraq relations, the complainant appears to suggest that the dynamic between the two countries had changed during this period. The Commissioner has no doubt that this is indeed the case but that does not mean that the importance of maintaining good international relations between the two countries had lessened.
32. The complainant also suggests that there is no longer a positive relationship of trust between the UK and Iraq and that therefore any prejudice to the UK's international relations would be slight. The Commissioner does not accept that this is the case but believes that it is more appropriate to consider these arguments in the context of the public interest test.

Public interest test

33. Section 27 is a qualified exemption and therefore is subject to a public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that where a qualified exemption applies, information shall only be

withheld if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

34. Firstly, the complainant maintains that there is a general public interest in information relating to matters regarding the Iraq oil industry in the period after the 2003 invasion of Iraq. He maintains that the Iraq war was very controversial and deeply unpopular amongst the British people and therefore the public interest in understanding the Government's activities in relation to Iraq is considerable. Moreover, the complainant points to what he says is a widely held suspicion both in the UK and Iraq that the invasion was motivated by a desire to control Iraq oil fields. The complainant suggests that if the information reveals disproportionate or inappropriate UK involvement in these issues then there is a public interest in disclosure as a matter of democratic accountability. Conversely, if the information does not reveal disproportionate or inappropriate UK involvement in such issues then there is a public interest in disclosure because, he argues, this would help to allay such suspicions.
35. The complainant also argues that there is a specific public interest regarding the position of BP in Iraq. In particular, he points to the close relationship between BP and the UK government and personal connections between officials on both sides. For instance, the complainant noted that Sir Jeremy Greenstock, former UK envoy to Iraq under the Coalition Provisional Authority (CPA) until March 2004, had become a special adviser to BP by the time the document was created in December 2004. In light of these personal connections the complainant argues that there is a public interest in greater transparency in order to shed light on any potential conflicts of interest and to assess whether the government was giving disproportionate assistance to BP in Iraq. The complainant is also concerned that any influence exerted by the UK government on behalf of BP may have been taken more seriously by the Iraq government in light of the fact that UK forces were occupying parts of the country at the time and therefore may have had a disproportionate influence on the Iraqi government.

Public interest arguments in favour of maintaining the exemption

36. The public authority has provided the Commissioner with details of the state of the UK – Iraq relationship at the time of the request and, as evidence of the importance of that relationship, provided specific examples of joint projects that were ongoing at the time of the

request. The public authority explained that both the UK and Iraq 'share a common understanding that joint effort and co-operation on political and diplomatic issues is essential to promote stability within Iraq and the wider region'. There is a public interest in maintaining the exemption as any difficulty caused to the relationship would be likely to undermine these efforts.

Balance of the public interest arguments

37. The complainant argues that as the information relates to Iraq, there is a general public interest in disclosure given the controversial nature of the Iraq war. The Commissioner does not accept this argument as it suggests that there will always be a public interest in the disclosure of information stemming from the invasion of Iraq. Just because the information relates to a particular issue does not mean that there is automatically a public interest in disclosure, the Commissioner must make his decision based on the information itself and in all the circumstances of the case. Whilst the information relates to Iraq, the Commissioner's view is that disclosure would not in any sense aid public understanding of the reasons behind, or legitimacy of, the invasion of Iraq in 2003. Having said that, the Commissioner has reviewed the requested information and does accept that there is a public interest in disclosure because it would aid public understanding of the nature of the relationship between the UK and the Iraq interim government.
38. As regards the complainant's specific public interest arguments surrounding the position of BP, the Commissioner would stress that the information that was redacted covers issues that go beyond BP and which relate to the internal politics of the Iraq interim government. This information would not provide any insight into the role played by BP and so the Commissioner has not taken these arguments into account when balancing the public interest.
39. The complainant has suggested that the relationship between the UK and Iraq had deteriorated dramatically by the time of his request. Therefore, he argues that the extent of any prejudice caused to the UK's relations would be slight. In view of this the Commissioner asked the public authority to comment on the state of relations between the two countries at the time of the request. In response it explained that the UK 'is continuing to develop a broad-based bilateral relationship with Iraq. This is based on close co-operation in a range of areas, including economic, commercial, development, defence, cultural and educational relations. We will continue, to work with the Iraqis to rebuild their country and help it to play its rightful role in the region'.

40. It provided the following specific examples of the UK – Iraq relationship:
- Assisting the Iraqi government improve the functioning of their energy sector through technical assistance, by building capacity in key department's tasked with addressing Iraq's energy problems and production.
 - UK naval trainers returning to Iraq in November 2009 to continue training the Iraqi navy and the Royal Navy resuming its support of the Iraqi maritime oil infrastructure.
 - A successful Department of Health led programme to re-train 400 clinicians and policy makers from all over Iraq.
 - Protecting Iraq's cultural heritage through the Basra Museum project.
 - Continue to support the growth of Iraqi democracy and its developing democratic institutions through support and technical assistance to the ever-maturing Iraqi Council of Representatives.
41. In light of this the Commissioner has concluded that despite the complainant's suggestions to the contrary, the relationship between the two countries was an important part of the UK's foreign policy interests and worthy of protection. The Commissioner finds that the public interest in disclosure was more general whereas there is a distinct public interest in maintaining the exemption. Therefore the Commissioner has concluded that the public interest in maintaining the exemption in section 27(1)(a) outweighs the public interest in disclosure.
42. The Commissioner is satisfied that the information redacted from the BP document is exempt under section 27(1)(a) and that the public interest favours maintaining the exemption. Therefore, the Commissioner has not carried out an assessment of the public authority's application of section 27(1)(d).

Section 41 – Information provided in confidence

43. The exemptions in both section 41 and section 43(2) were applied to the information redacted from the Shell document. However, section 41 was applied to all of the redacted information and so the Commissioner has considered the application of this exemption in the first instance.

44. Section 41 provides that information is exempt if it was obtained from any other person and disclosure of the information would constitute an actionable breach of confidence.
45. In this case the redacted information was obtained by the public authority from Shell in the course of a meeting of which notes were taken. The Commissioner would stress that for the purposes of section 41 'person' includes both natural persons and legal persons such as companies. The complainant had suggested that not all of the information was 'obtained' from Shell as the public authority could have created some of the information itself such as any analysis of issues arising from the meeting. The Commissioner has reviewed the redacted information and is satisfied that nearly all of the information was obtained from Shell. However, the Commissioner found that one sentence that was redacted from a section of the notes headed 'Action and next steps' was not obtained from Shell. This information was instead the public authority's commentary on the issues raised in the meeting and does not reveal any of the information put forward by Shell. Section 41(1) does not apply to this information.
46. The most commonly cited test of an actionable breach of confidence, for commercial information, is that set out in the case of *Coco v Clark*.⁷ The Commissioner recognises that there are other approaches to analysing the common law of confidentiality but considers that this is the appropriate test to apply in the circumstances of this case. Under this test a breach of confidence will be actionable if:
- the information has the necessary quality of confidence,
 - the information has been imparted in circumstances importing an obligation of confidence, and
 - there was an unauthorised use of the information to the detriment of the confider.

The necessary quality of confidence

47. Information can be said to have the necessary quality of confidence if it is not otherwise accessible and is more than trivial. As regards the accessibility of the information, the complainant has suggested that information regarding Shell's commercial activities with regard to Iraq has entered the public domain through various sources. The Commissioner has reviewed the redacted information and compared this against the information in the public domain which the complainant

⁷ *Coco v A N Clark (Engineers) Limited* [1968] FSR 415

referred to. He has found that the information has not previously been made publicly available. The Commissioner accepts that some information about Shell's involvement in the Iraqi gas sector is well known, however, the redacted information goes beyond what he has found to be in the public domain. Specifically the Heads of Agreement document referred to at paragraph 17 relates to a later project entered into by Shell and the Iraqi Government rather than the earlier work carried out by Shell in relation to the Gas Master Plan which is the subject of the information falling within the scope of the request.

48. It is also generally accepted that, since the law does not concern itself with trivialities, information which is trivial will not have the necessary quality of confidence. In this case the information constitutes commercially sensitive information regarding the multinational oil company Shell. At the meeting when the notes were created Shell explained that the information contained highly confidential plans regarding commercial activity. The public authority subsequently consulted with Shell after receiving the request at which point Shell confirmed that the information remained commercially sensitive as the negotiations to which the information related were still ongoing.

An obligation of confidence

49. Even if information might otherwise be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances giving rise to an obligation of confidence. Information shared in public will therefore not be confidential. Whilst there is no absolute definition of a circumstance giving rise to an obligation of confidence, the Commissioner considers that the 'reasonable person' test is a useful test, i.e. would a reasonable person standing in the shoes of the recipient of the information realise that the information was being given to him in confidence.
50. In this case the Commissioner considers that the issue is relatively clear cut. The un-redacted information reveals that Shell shared the information with the public authority only after explicitly asking the public authority to treat the information as confidential. The un-redacted information states that Shell were 'at pains to stress that our discussion was on a strictly 'in confidence' basis and this record, and the whole project concept discussed, should be treated as such'. Therefore, the Commissioner is satisfied that when the public authority obtained the information it did so in circumstances giving rise to an obligation of confidence.

Detriment to the confider

51. The public authority has explained that Shell consider the information to be commercially sensitive and that its unauthorised use would be to their detriment because if their competitors were to learn of their plans it would allow them to gain a competitive advantage in a highly competitive international sector. Competitors could use the information to undermine Shell's negotiating position with the Iraqi government or submit rival proposals which could lead to a loss of business.
52. Given that the information relates to commercially sensitive discussions which were still ongoing the Commissioner is satisfied that disclosure would result in detriment to Shell and that therefore this element of the test is met.

Is there a public interest defence to a breach of confidence?

53. The Commissioner is satisfied that the information was obtained from a person other than the public authority holding it and that disclosure would amount to an actionable breach of confidence. However, before the Commissioner can decide if the exemption is engaged he must consider whether a public interest defence to a breach of confidence could be established.
54. Section 41 is an absolute exemption and therefore is not subject to the ordinary public interest test that would be applied for a qualified exemption. Under section 2(2)(b) of the Act information shall only be withheld where a qualified exemption applies if the public interest in maintaining that exemption outweighs the public interest in disclosure. For section 41 the test is reversed: a public interest defence will only succeed if the public interest in disclosure outweighs the public interest in maintaining the confidence.
55. The Commissioner's view is that where there is an express obligation of confidence then that confidence should not be overridden on public interest grounds lightly and that any reasons why the public interest favours disclosure should be clearly stated.
56. As noted at paragraph 34, the complainant argues that there is general public interest in disclosure of information relating to Iraq and its oil industry due to the controversy surrounding the Iraq war. The complainant also suggests that as in the case of the BP document, there were a number of personal connections between employees of Shell and the Government and that there should be greater transparency in order to reveal any potential conflicts of interest.

57. The complainant suggests that there is also a specific public interest in disclosure in order to reveal the extent to which Shell, by producing the gas Masterplan, was able to use its position as an impartial adviser to the Iraqi Government to gain subsequent contracts, based on the advice it had given. The complainant suggests that this is what happened and points to the September 2008 deal between the Iraqi Government and Shell to gather gas from the South of Iraq which was revealed with the publication of the 'Heads of Agreement' document referred to in paragraph 17. The complainant has explained that this deal has been very controversial in Iraq for 'granting Shell a monopoly, for being awarded non-competitively, and for focusing on export in spite of severe domestic shortages'.
58. The Commissioner has balanced the public interest in disclosure against the public interest in preserving the confidence and the impact that would be caused to the interests of the confider (Shell). Firstly, the Commissioner has taken into account what he considers to be the wider public interest in preserving confidentiality. This is because the consequence of any disclosure of confidential information will be, to some degree, to undermine the principle of confidentiality which is to do with the relationship of trust between confider and confidant. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. The Commissioner finds support for this approach in the case of *Pauline Bluck v The Information Commissioner and Epsom and St Helier University NHS Trust* where the Information Tribunal quoted from the House of Lords decision of *Attorney General v Guardian Newspapers* [1990] 1AC109 where it stated that:
- "...as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence..."⁸
59. In the circumstances of this case there is also a specific public interest in preserving the particular relationship of trust protected by confidentiality. The public authority has argued that disclosure would be very likely to have a 'detrimental effect on our ability to operate in our market place'. It explained that its reputation relies on it being seen to maintain assurances that information supplied to it will be treated in confidence and this would be damaged if the information was disclosed. It went on to say that 'release, in an extremely competitive industry, would or would be likely to damage [the public authority's]

⁸ *Pauline Bluck v The Information Commissioner and Epsom and St Helier University NHS Trust* [EA/2006/0090], para. 8.

ability to assist the many SME's who provide services to the large players such as Shell'. Any damage to the public authority's reputation could, it argues, stop it undertaking its remit to help businesses which would in turn bring less economic benefit to the UK.

60. The Commissioner recognises that the public authority performs a valuable role by bringing jobs and prosperity to the UK. Clearly there is a strong public interest in ensuring that it is able to continue to do this. The Commissioner accepts that disclosure of commercially sensitive information regarding a large multinational company such as Shell would be likely to affect its reputation for maintaining confidences. Therefore the Commissioner has given particular weight to the arguments for maintaining the confidence. Whilst the Commissioner accepts that there is a public interest in greater transparency in the way in which the UK Government and the public authority interact with companies such as Shell he is not satisfied that this is sufficiently strong to justify breaching the confidence the public authority owes to Shell in this case.
61. The Commissioner has found that there would not be a defence for a breach of confidence in this case and consequently he has found that section 41 is engaged.

Section 43(2) – Commercial interests

62. The Commissioner has found that the information redacted from the Shell document is, with one minor exception, exempt under section 41 of the Act. Therefore the Commissioner has not undertaken a full analysis of the public authority's application of the section 43(2) exemption, which provides that information is exempt if disclosure would, or would be likely to, prejudice the commercial interests of any person. However, for the sake of clarity, the Commissioner wishes to make it clear that he does not consider that section 43(2) applies to the single redacted piece of information which he found had not been obtained from Shell and therefore was not covered by section 41. This is because the information, as noted at paragraph 46 above, concerns the public authority's reaction to the information it obtained as a result of its meeting with Shell. This particular information does not refer to Shell's plans or include any commercial information and cannot prejudice its commercial interests. Therefore section 43(2) is not engaged.

Section 40 – Personal information

63. The public authority has confirmed that it is applying section 40 to the names of individuals featured in both documents. This includes the

names of civil servants who sent or received the emails. The complainant has said that he is not interested in who received or who was copied into the emails and so the Commissioner has not considered this in his analysis. The names of Iraqi officials as well as the names of representatives of the business concerned have also been withheld. As regards the Iraqi officials, the Commissioner has found that their names will be exempt, in the case of the BP document, on the basis of the section 27(1) exemption as outlined above. For the Shell document, the names of the Iraqi officials are contained within the main body of information which the Commissioner has already decided is exempt under section 41. Therefore it only remains for the Commissioner to consider the names of any civil servants who sent the emails, and whose names appear in the main body of the emails as well as the redacted names of representatives of BP and Shell (whose names are not otherwise exempt under section 27(1)(a) or section 41)

64. The public authority has explained that it is relying on section 40(2) of the Act which provides that information shall not be disclosed if it constitutes the personal data of someone other than the applicant and if it satisfies one of two conditions relating to the Data Protection Act 1998 (DPA 1998). In this case the relevant condition is the first condition which is that disclosure would contravene any of the data protection principles. The public authority has argued that disclosure would contravene the first data protection principle which requires that data be processed fairly and lawfully.

Is the information personal data?

65. In deciding whether the exemption applies it is first necessary to consider whether the withheld information (the names of civil servants and representatives of the two companies) constitutes personal data. Personal data is defined in the DPA 1998 as:

'...data which relate to a living individual who can be identified –
(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come into the possession of the data controller,

And includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;'

66. The names of individuals will not always be personal data. A common name like 'John Smith' when viewed in isolation is unlikely to allow for that individual to be identified. Much depends on the context of the information. However, in this case the Commissioner is satisfied that

the information is personal data. This is because the names of the individuals when combined with the other withheld information and the fact that it would be known that the individuals are either civil servants or representatives of the companies concerned would allow the individuals to be identified.

The first data protection principle

67. Having satisfied himself that the information is personal data the Commissioner has gone on to consider whether disclosure would contravene the first data protection principle. The first data protection principle states that:
- '1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.'
68. The public authority has argued that disclosure would contravene the first data protection principle because it would not be fair to the individuals concerned. It said that in applying the exemption its prime consideration was whether the data subjects had given their consent or would reasonably expect their names to be associated with the subject matter of the two documents.
69. In considering the fairness of disclosure the Commissioner has taken into account the following factors:
- The expectations of the individuals
 - The possible consequences of disclosure
 - Nature and content of the information
70. When balancing these factors the Commissioner has had to make a distinction between the civil servants, and representatives of the businesses concerned. Whilst disclosure may be fair in one case it would not be necessarily fair in another case as different individuals will have varying expectations of disclosure and the effects of disclosure will not always be the same.

Civil servants

71. The public authority has explained that as regards its own civil servants, it thought that the individuals were below the Senior Civil Service, although given the length of time that had passed it had not been possible to confirm this in all cases. Some of the civil servants

featured in the emails were from the Foreign and Commonwealth Office (FCO). The public authority said that it had consulted the FCO's own policy and whilst it appeared that the identities of staff doing high-profile jobs, such as Permanent Under Secretaries or Head of Post overseas were in the public domain, this was not the case for other FCO staff. It explained that the FCO's policy was not to disclose the names of other staff for security reasons. It said that there were particularly strong concerns for staff who had in the past worked 'on areas such as counter terrorism and/or been stationed in high risk places like Iraq, Afghanistan or Pakistan, where the terrorist threat against the UK is high'. It informed the Commissioner that the FCO has specific examples of instances where threats to the personal security of FCO officials in such positions had been made.

72. In considering the expectations of the individuals the Commissioner considers that a distinction can be drawn between information that relates to an individual's professional life and information that relates to their private life. The Commissioner is of the view that civil servants and other public officials should not automatically expect that information about their professional lives will not be disclosed. The Commissioner finds support for this approach in a decision of the Information Tribunal in a case where it found that:

"...where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives..."⁹

73. Therefore the Commissioner is of the view that none of the civil servants featured in the information should reasonably expect that information about them will never be disclosed. The Commissioner also considers that the more senior an individual the less likely it is that they should expect information about their professional life to not be disclosed.
74. The Commissioner has also taken into account the possible consequences of disclosure and notes the public authority's concerns about revealing the identities of staff who have worked in high risk areas or on sensitive issues such as counter terrorism. The Commissioner considers that this is a more compelling argument as to why disclosure would be unfair and this has led him to conclude that in most cases the names of the civil servants should not be disclosed. However, the Commissioner found that two particular individuals were

⁹ The Corporate Officer of the House of Commons v The Information Commissioner and Norman Baker MP [EA/2006/0015 and 0016], para. 78.

at the time of the request very senior civil servants, in public facing roles and who are known to have worked in the Middle East including in Iraq. In these circumstances it is difficult to conclude, on the basis of the arguments put forward by the public authority, that disclosure would be unfair. For the other more junior officials, the Commissioner is satisfied that on balance disclosure would be unfair.

Lawfulness

75. The Commissioner has next considered whether disclosure would be lawful. The most obvious example of where disclosure is likely to be unlawful is if disclosure would contravene a statutory prohibition. However, the Commissioner is not aware of any statutory prohibition which would serve to prevent disclosure in a case like this. The Commissioner would also stress that given his previous findings on the fairness of disclosure, he is satisfied that disclosure would not contravene any of the articles of the Human Rights Act 1998.

A schedule 2 condition?

76. Even if disclosure of personal data would be fair and lawful, the first data protection principle also requires that a condition in schedule 2 of the DPA 1998 is met before the information is disclosed and so the Commissioner has gone on to consider whether a schedule 2 condition would be met in the case of the names of the individuals for which he has decided that disclosure would be fair. In this case the Commissioner considers that the relevant condition is the 6th condition which states that:

'6.-(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or third parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

77. The Commissioner's approach is to consider whether the 6th condition is met by way of the following 3 part test which must be satisfied:
- there must be legitimate interests in disclosing the information,
 - the disclosure must be necessary for a legitimate interest of the public and,
 - even where the disclosure is necessary it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject(s).

78. In this case the Commissioner believes that the legitimate interest in disclosure lies in greater transparency in the government's relations with the companies concerned and in particular, in knowing more about the level at which the discussions were conducted. The Commissioner is of the view that disclosure is necessary to achieve these legitimate interests.
79. Given that the Commissioner is satisfied that the disclosure would not be unfair and in view of the fact that it is already widely known that the two individuals concerned have worked in Iraq the Commissioner has decided that disclosure would not cause any unwarranted interference with their rights, freedoms and legitimate interests. Consequently, the Commissioner has decided that in respect of the two individuals disclosure would not contravene the first data protection principle and so section 40(2) is not engaged. The Commissioner will inform the public authority of the relevant individuals in a confidential annex to this decision notice.

Business representatives

80. Section 40 has also been applied to withhold the names of the representatives of the two companies. The public authority explained that it had consulted the companies (though not the individuals) who had requested that names not be disclosed. It went on to say that 'taking into consideration that they had not given consent to the release it was unlikely that they would allow us to associate their names with sensitive information being placed in the public domain' and that therefore it had respected their request. In both cases it said that the individuals' expectations would be for confidentiality, given the sensitive commercial nature of the subject matter and the fact that the meetings took place in a spirit of confidentiality.
81. When considering the expectation of the individuals the Commissioner will also look at the seniority of the role and whether the role is public facing. In this case the Commissioner has established that some of the individuals are very senior figures with public profiles. In these circumstances the Commissioner is of the view that there would be a reasonable expectation that information relating to their professional life might be disclosed.
82. As regards the possible consequences of disclosure, the Commissioner would stress that he is only considering the names of the individuals that have been redacted from the information within the emails that the public authority disclosed to the complainant. Where the names of individuals are contained within the wider body of information that the public authority has withheld, then the Commissioner has accepted

that the names should not be disclosed because he has already decided that the information is either exempt under section 27(1)(a) of the Act or section 41 of the Act. The names of individuals that have been redacted from the disclosed information have been withheld so as to avoid associating those individuals with that information. With this in mind, the Commissioner has considered the possible consequences of disclosure and is of the view that these individuals are for the most part high-profile representatives of their respective businesses and therefore their positions would be relatively well known. It would be reasonably assumed that these particular individuals would be involved in the discussions to which the emails relate. Given that the two firms are known to have been involved in the Iraqi Oil and Gas industry in the period after the 2003 invasion it would be difficult to see what adverse consequences would be caused through disclosing the previously redacted names. However, the Commissioner did find that for the Shell document, two of the individuals featured in the information were less senior, did not have the same public profile as the other individuals and therefore there was a greater expectation that their names would not be disclosed. The Commissioner accepts that disclosure would be unfair for these particular individuals.

83. In considering the fairness of disclosure of the more senior business representatives, the Commissioner has also taken into account any legitimate interest in disclosure and balanced this against the rights and freedom of the individuals concerned.
84. The complainant has himself argued that there is a legitimate interest in disclosure as it would aid public understanding of the nature of the relationship between the two companies and the UK government, and decisions made during the occupation of Iraq. He maintains that the information contained within both documents is of significantly less value when these names are removed. The Commissioner accepts that this is the case as disclosure of the names of individuals allows the public to better appreciate at what level these discussions were taking place.
85. Having decided that disclosure would be unlikely to have any harmful consequences for the individuals concerned and that these individuals would have had at least some expectation that personal information could be disclosed, the Commissioner finds that in view of the legitimate interests in disclosure in this case, disclosure would not be unfair.

Lawfulness?

86. As in the case of the names of civil servants, the Commissioner has considered whether disclosure would be lawful. Again the Commissioner is not aware of any statutory prohibitions preventing disclosure and he is satisfied that disclosure would not contravene any of the articles of the Human Rights Act 1998. For the avoidance of doubt, the Commissioner would also stress that in respect of the Shell document he does not consider the names of their representatives to be information for which disclosure would constitute an actionable breach of confidence.

A schedule 2 condition?

87. As with the names of the civil servants, the Commissioner has gone on to consider whether disclosure would meet a schedule 2 condition. Again the relevant condition is the 6th condition and the Commissioner will need to carry out the same 3 part test as described at paragraph 77.

88. The Commissioner has already accepted that there is a legitimate interest in disclosure which lies in increasing public understanding of the nature of the Government's relationship with the two companies and in shedding further light on the level at which these particular discussions took place.

89. The Commissioner is satisfied that disclosure is necessary to meet these legitimate interests because he can see no other information which would reveal which individuals were party to these particular discussions and he can see no other means of shedding further light on the nature of these relationships.

90. The Commissioner has made it clear that in his view disclosure would be unlikely to lead to any harmful consequences for the individuals concerned and so has decided that disclosure would not cause any unwarranted interference with their rights, freedoms and legitimate interests. Therefore the Commissioner has decided that disclosure of the names of the more senior business representatives would not contravene the first data protection principle and so section 40(2) is not engaged. The Commissioner will again inform the public authority of the relevant individuals in the confidential annex.

Procedural Requirements

Section 1 – General right of access to information held by public authorities

91. By failing to disclose the information which the Commissioner has decided is not exempt the public authority breached section 1(1)(b) of the Act which requires a public authority to communicate requested information to an applicant.

Section 10 – Time for compliance

92. The public authority disclosed to the complainant some of the requested information in its initial response and at the internal review stage. By failing to disclose this information within 20 working days the public authority breached section 10(1) of the Act. The public authority also breached section 10(1) of the Act by failing to disclose within 20 working days the information which the Commissioner has decided is not exempt.

Section 17 – Refusal of a request

93. The complainant submitted his request to the public authority on 22 June 2009. The public authority responded to the request on 15 August 2009 at which point it disclosed some information but withheld other information. In respect of the withheld information the public authority breached section 17(1) of the Act by failing to issue a refusal notice within 20 working days of receiving the request.

The Decision

94. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The public authority dealt with the request in accordance with the Act to the extent that it correctly withheld the requested information under section 27(1)(a) of the Act.
 - The public authority dealt with the request in accordance with the Act to the extent that it correctly withheld some of the requested information under section 41 of the Act.

- The public authority dealt with the request in accordance with the Act to the extent that it correctly withheld some of the requested information under section 40(2) of the Act.
95. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority breached section 1(1)(b) of the Act by incorrectly applying section 41(1) to withhold some of the requested information.
 - The public authority breached section 1(1)(b) by incorrectly applying section 40(2) to withhold some of the requested information.
 - By failing to disclose information to the complainant within 20 working days of receiving the request the public authority breached section 10(1) of the Act.
 - By failing to issue a refusal notice within 20 working days of receiving the request the public authority breached section 17(1) of the Act.

Steps Required

96. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose to the complainant the information which the Commissioner has decided is not exempt under section 41(1) or section 40(2). The Commissioner has produced a schedule as a confidential annex to this notice, outlining the information which must be disclosed.
97. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

98. 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

99. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 26th day of August 2010

Signed

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

Legal annex

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled -

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 2(2) provides that -

"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"

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."

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.”

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

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."

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)."