

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 November 2018

Public Authority: Department for International Trade
Address: 3 Whitehall Place
London
SW1A 2AW

Decision (including any steps ordered)

1. The complainant has requested information concerning the names of companies applying for licences for the export of equipment with Military List ratings during 2016 and the destination countries and Military List ratings of such exports. Department for International Trade provided the complainant with a list of all companies which applied for licences for the export of such equipment during 2016 but withheld the remainder of the information requested under section 41(1)(information provided in confidence) and section 43(2)(prejudice to commercial interests).
2. The Commissioner's decision is that Department for International Trade correctly applied the section 41(1) exemption to the withheld information and there is no valid public interest defence which would override that duty of confidentiality.

Background

3. Department for International Trade (DIT) has overall responsibility for the statutory and regulatory framework of export controls, and for decisions to grant or refuse an export licence. Foreign and Commonwealth Office (FCO) and Ministry of Defence (MOD) are DIT's principal advisers, along with Department for International Development (DFID), advising on the Consolidated EU and National Arms Export Licensing Criteria, which are used to assess licence applications. References to 'ECO' in this decision refer to the Export Control Organisation (now Export Control Joint Unit) which administers the UK's system of export controls and licensing for military and dual-use items.

ECJU (which is located within DIT) brings together operational and policy expertise from DIT, FCO and MOD.

Request and response

4. On 9 January 2017, the complainant wrote to DIT and requested information in the following terms:

'A list of the names of all companies that applied for licences for the export of equipment with Military List ratings during 2016. I would like the list to be broken down by destination country and Military List rating.'

The request is as for (reference number of previous request redacted) and I would appreciate a response in the same format, i.e. a spreadsheet with three columns – one for company name, one for destination country, and a third for the Military List rating'.

5. DIT responded to the request on 6 February 2017 and provided the complainant with an excel spreadsheet containing a list of all companies that applied for licences for the export of equipment with Military List ratings during 2016. The Department advised the complainant that to the extent that his request was for release of *'entities linked to the licensing data provided'*, this information was exempt from disclosure in that format under sections 41(1) and 43(2) of the FOIA.
6. The response acknowledged that in previous requests for similar information, the complainant had been provided with the company names, along with details of the destination and rating, but after careful consideration of the request, the Department considered that this information was exempt.
7. DIT stated that they considered that *'general public interest arguments'* about the disclosure of what the Department licensed and what they do not licence are answered by the general disclosure made by departments in the publication of the Annual and Quarterly Reports on Strategic Export Controls. The Department noted that these reports were available to view at the government website and they contained detailed information on export licences issued, refused or revoked, by destination, including the overall type (eg Military, Other) and a summary of the items covered by these licences.
8. The complainant requested an internal review on 28 March 2017. He noted that, *'having received the requested information on an annual basis for several years, it is hard to comprehend how it can suddenly be withheld. Last year, the full information for 2015 was provided in 21 working days. Similar information has been provided for all years from 2008 (aside from reduced information in 2011, due to a mistake)'*. The

complainant stated that, *'clearly, this represents a substantial and significant move away from transparency'* on the part of the Department and asked them to revert to their previous practice of disclosure.

9. DIT provided the complainant with their internal review on 27 April 2017. The review upheld the use of both exemptions to withhold the requested information. DIT acknowledged that information of the type requested by the complainant had been provided to him in response to previous requests to the Department. They explained that they had not considered that section 41(1) applied to those previous requests because, although the information was provided in confidence, they considered that the *'limited amount of information'* which the complainant had requested (eg name of company, end-user destination and rating) could be released. DIT stated that *'this was a decision that was taken in light of the fact that no further licensing information was being released and it was a decision that was taken at the time of your previous requests'*.
10. However, DIT advised the complainant that they considered that the information requested could no longer be released in full because *'each FOI request is considered on a case-by-case basis at the time of the request'* and that since the time of the complainant's previous requests, they had *'received strong representations from a large number of companies who have expressed concern at release of this information into the public domain'*. DIT advised the complainant that the arguments put forward by the companies were *'compelling'* and the Department considered that there was a real risk associated with disclosing licensing information linked to company names. In light of the representations received, and following consideration of the current request, the Department considered that disclosure of the information would result in an actionable breach of confidence (by the companies concerned).
11. DIT stated that:

'Licensing information linked directly to named companies is information that was provided to the ECO in confidence for the purpose of applying for an export licence. This information is taken directly from the licence application forms that the companies provided to ECO in confidence and this information, in the majority of cases, is not publicly available, e.g. company names alongside licensing information are not included in the official statistics that Her Majesty's Government publishes relating to export licensing'.
12. DIT advised that they did not consider that there were any *'specific public interest grounds'* that would override their duty of confidentiality

to the companies concerned. The Department contended that although there is a general public interest in scrutinising UK export licensing activity, *'that public interest is already well served by the large amount of material that is already made public as official statistics. This published information clearly indicates what we allow to be exported and to where'*. DIT stated that it was important to remember that it is the Government that licenses the exports, and that the companies had acted lawfully by applying for export licences.

Scope of the case

13. The complainant contacted the Commissioner on 25 July 2017 to complain about the way his request for information had been handled.
14. As noted, in their original response to the request, DIT provided the complainant with a list of the names of all companies that applied for licences for the export of equipment with Military List ratings during 2016.
15. It is the destination country and Military List rating information, as linked to the companies, which DIT considers to be exempt from disclosure on the basis of sections 41 and 43 of the FOIA. The withheld information relates to 8793 Standard Individual Export Licence (SIEL)¹ applications and 300 Open Individual Export Licence (OIEL)² applications submitted by 918 individual companies. It is the decision to withhold this information which forms the basis of the Commissioner's investigation.

¹ SIELS allow shipments/transfer of a set quantity of goods, technology or software, including value, to a specified consignee and/or end-user.

² OIELS allow multiple shipments/transfers of unlimited quantities or value of specified goods technology or software to specified destinations and/or, in some circumstances, specified consignees and/or end-users.

Reasons for decision

Section 41 – information provided in confidence

16. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

Was the information obtained from another person?

17. The names of companies that applied for licences for the export of equipment with Military List ratings during 2016, including details about the End-User countries and specific Goods Ratings, is information provided on export licence applications which are submitted by companies to DIT as the responsible public authority.

Would disclosure constitute an actionable breach of confidence?

18. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

- Whether the information has the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

19. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.

20. DIT has advised that the information is confidential as it includes sensitive commercial information from the companies which would not in the majority of cases be publicly available. This information is often derived from confidential contracts that the UK companies have entered with their customers (eg with the Consignees and/or End-Users). The confidential sensitive commercial information falling within scope of this request is the End User Countries and Goods Ratings related to export licence applications from named companies in respect of the proposed export of Military rated equipment overseas.

20. The Commissioner has had sight of the withheld information and would accept that it is not otherwise accessible and it cannot be said to be

trivial. Consequently, the Commissioner is satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

21. The Commissioner refers to the test set out in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, specifically:

'If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence'.

22. DIT advised the Commissioner that under the Export Control Act 2002, there is one main order giving the Secretary of State the power to grant licences – the Export Control Order 2008 (SI 2008/3231). The information provided on licence applications is information provided in confidence to the Government solely to enable HMG to consider whether a licence for export of certain strategic goods can be granted. Article 43 of the Export Control Order 2008 sets out the purposes for which information held by the Secretary of State in connection with the operation of export controls may be used. In particular, article 43(2) states that the information *'may be used for the purposes of, and for any purposes connected with (a) the exercise of functions in relation to any control imposed by this Order or by any other order made under the Export Control Act 2002'.*

23. DIT advised the Commissioner that there is also *'a long-standing understanding amongst the exporting community'* that applications for export licences are supplied in confidence. The Department stated that companies do not expect information they supply on licence applications to be disclosed beyond that which is published as official statistics in the Annual and Quarterly Reports on Strategic Export Controls and on the Strategic Export Controls Reports and Statistics website. *'Moreover, they do not expect licensing information to be released along with their company name'.*

24. In submissions to the Commissioner, the complainant stated that exporters have been aware, since 2013 at the latest, that any information submitted by them to DIT may be made public. This is because in May 2013 the declaration on export and trade control applications was updated to include an FOIA Declaration. The Declaration includes a note informing the exporter that *'any information you provide in this application may be made public under the Freedom of Information Act (FOIA) 2000. If you consider that the disclosure of any such information would be harmful to your interests please tick the*

box and provide a full explanation below. Please note that while the ECO will take your views into account we cannot guarantee that the information will not be disclosed in compliance with FOIA'.

25. In submissions to the Commissioner, DIT advised that it is not unusual for the declaration to be left blank, and that '*companies are focussed on submitting their applications as soon as possible because they will often need an export licence quickly in order to fulfil orders under contract*'. Having reviewed previous FOIA requests to the Department for export licence related information, DIT confirmed that '*some companies have ticked the box to object to disclosure and some have not*'. However, DIT contended that the fact that the FOIA declaration is left blank is not an indication that the company does not have any concerns about disclosure of information under the Act, confirming that, '*we have previously had very strong expressions of concern about disclosure from companies who had left this section blank*'.
26. The Commissioner is satisfied that export licence application information is provided to DIT by companies in circumstances which import an obligation of confidence upon the Department. It is important to be clear that whilst any such information is subject to the FOIA, the Act contains a number of exemptions to disclosure, such as those applied by DIT in this case. That is to say, it does not follow that export licence application information held by DIT and subject to the FOIA will necessarily or automatically be disclosed in response to a request.
27. However, the Commissioner considers that the expectations and understandings of both the complainant and the companies in this case are affected by the Department's handling of the complainant's previous requests for information of the same type. DIT have stated that companies do not expect licensing information to be released along with their company name. Yet this (linked) information for 2015 was provided to the complainant in response to a previous request and similar such information has been provided to the complainant since 2008. Therefore, in submitting the request of 9 January 2017, the complainant had a reasonable expectation of being provided with the information in full without any information being withheld. The Commissioner addresses the Department's explanation for the change in practice below.
28. Given that the Department has provided this type of information (company name, destination country and Military List rating) to the complainant (and therefore the public domain) for the past several years, it could be argued that the companies will have had an expectation that DIT would continue to disclose such information (but not more detailed export licence related information) upon request for the same, whether or not the companies were in agreement with such disclosure.

Would disclosure be of detriment to the confider?

29. In the internal review, DIT, in acknowledging that information of the type being withheld had been previously provided to the complainant in response to past requests, stated that ECO had considered that section 41 did not apply to those previous requests because although the information was provided in confidence, ECO considered that the '*limited amount of information*' being requested could be released.
30. In submissions to the Commissioner, the complainant stated that the information requested is aggregated for a whole year. '*No other information is requested aside from rating and destination country. The information requested does not ask whether the licence applications are withdrawn, granted or refused, nor is it known in which year licences are granted or refused*'.
31. In their submissions to the Commissioner, DIT advised that '*at the time, ECO considered that it was in the public interest to release this level of information and that no FOIA exemptions applied to withhold it. The level of information requested was considered, at the time, to be a 'limited amount of information*'. However, DIT advised that they had since become aware that this level of information can be used to obtain additional information about the licence applications through the '*mosaic*'³ or '*jigsaw*' effect.
32. DIT advised the Commissioner that as a result of the previous disclosures of this type of information to the complainant, release of the requested licensing information, even if separate from the names of the companies, could enable the complainant or other individuals to work out which company applied to export which goods and to where. This is because the type of information (ratings and end-user destinations) is similar to that which was requested (and provided) in previous years. The information can be used to locate additional information from the Reports and the Strategic Export Controls Reports and Statistics website.
33. DIT explained that through the mosaic effect, the complainant or other interested member of the public or group could use the requested information to find out the exact date (by month in the year specified in the request) that a licence was granted, refused, withdrawn or revoked.

³ Used to refer to the argument that whilst it may not be prejudicial to disclose the requested information in isolation, it would be prejudicial where the requested information can be combined with other information already in the public domain or already known to the requester.

This is possible through cross-referencing the withheld information with information in the Quarterly and Annual Reports. The Department provided the Commissioner with examples illustrating how this could be done.

34. The Department contended that the additional information revealed is sensitive contractual information and disclosure of this information through the mosaic effect would be likely to risk business relationships between UK companies and companies overseas, which could result in a loss of business. DIT stated that the fact that the values would be disclosed alongside the type of goods, the overseas destination and the date (by quarter in a given year – in this case 2016) would be likely to put the UK company that was granted the licences (and other UK companies trading in the same or similar goods in relation to overseas competition), at a competitive disadvantage.
35. DIT contended that this is a risk even if the licensing information (the withheld information) was released separately to the names of the companies that they had already disclosed to the complainant. This is because information about the type of goods, destination country and value could be used by other companies to offer the same or similar goods at a cheaper rate to customers in that country. When looking to source those goods from the UK or from an overseas destination, customers might choose to do business with companies that are offering to supply the goods at a cheaper price – an action that the companies would be able to do (eg set a cheaper price) in light of the additional information that would be disclosed as a result of the mosaic effect.
36. More broadly, DIT contended that detriment would be likely to be caused to the UK exporter and to the consignees/end-users. This is because exporters might be reluctant to include the same level of information on export licence forms if there is a risk that some or all of the information they submit might be made public. This would undermine the export licensing process which would be likely to cause detriment to the Department, in relation to its ability to assess licence applications effectively, and to the exporter and overseas customers (business) because of the risk of delays to licence applications due to insufficient/incomplete information and the risk of applications being stopped or refused as a result of this.
37. DIT confirmed that all companies that apply for export or trade licences must supply a certain amount of information on the application form and must also provide supporting documentation. Without the required information an application will not be processed. It is an offence for a company to knowingly provide false information, which potentially includes knowingly withholding information from their application.

38. The Department advised the Commissioner that in a meeting with a trade association in November 2016, exporters informed the Department that they may have to consider very carefully the level of information provided with their export licence as in some cases releasing this information could put them in breach of the contract they signed with the end-user. The trade association had requested the meeting after a number of companies expressed their concerns to them following previous disclosures of this type of information by the Department. DIT could not locate any minutes of this meeting but did provide the Commissioner with a proposed agenda for the same, which included, as an area for discussion, 'Supplier Experience Post Release of Information'.
39. Specifically, the companies explained how the release of information that associated them with their exports caused friction with the parties they had entered into contracts with because of non-disclosure agreements. They explained that a particular item being exported can be identified through cross referencing the company's name with the goods they manufacture, and a destination, and the type of end-user (commercial, government, private or other). A mosaic effect can be achieved through use of search facility (based on the type of end-user) that DIT added to their searchable database in 2016. The mosaic effect allows a user to identify exactly what goods other governments are buying and when.
40. The Department stated that, *'we only publish generic information about what goods go to where. For some exports and some governments this indicates the type of capability they are procuring, which is a national security issue for them'*. DIT advised the Commissioner that at the time of adding the search facility to the searchable database *'we did not realise the risk of further information being identified through the 'mosaic' effect. However, through representations made by companies and following discussions with the trade association, we are now aware that, through the 'mosaic' effect, disclosure of additional information under the Act can be used to identify further information from manipulation of the published information'*.
41. Contending that disclosure of the withheld information would *'enable the complainant and other members of the public to work out which company applied to export which goods to where and when the export licence was granted'*, DIT advised the Commissioner that, *'through use of the mosaic effect we receive Parliamentary questions that describe export licences granted by the specific date, even though that specific date has never been released'*.
42. DIT explained that:

'Even if the End-User Countries and Goods Ratings are disclosed separately from the names of the companies that have already been disclosed to (the complainant), such disclosure would in part enable (the complainant) and others to link companies to the licensing information. This is because the type of goods and end-use destination on the licence applications remains the same in most instances as those on the previous licence applications (that fell within scope of the previous requests for this type of information) where the requested information was, in hindsight, wrongly disclosed'.

43. DIT advised the Commissioner that as the type of goods (Goods Ratings) and end-use destination on the licences falling within scope of the current request remain the same as those included on the licences falling within scope of the previous requests, *'it would be possible to cross reference the licensing information with the information previously released to link this information to particular companies'*. The Department provided the Commissioner with examples as to how this could be done.
44. In respect of the examples provided, in submissions to the Commissioner DIT cited paragraphs 5 and 6 of the ICO guidance on information in the public domain which state that in essence the correct approach will always be *'to look at the effect the disclosure would have in light of the information already in the public domain'*.⁴ Relevant information in the public domain might include the requested information itself or (as in this case) *'some other information on the same subject, or similar information on a similar subject'*. DIT contended to the Commissioner that the examples provided to the Commissioner clearly show that the information disclosed previously, to the extent that it is in the public domain, would assist individuals to cross-reference that information with the withheld information (if disclosed) to gain further information about which company applied for which licence and what the Goods Rating was and the End-Use destination.
45. In submissions to the Commissioner, DIT referenced a number of previous ICO decisions involving similar information to that involved in the present case. FS50502939 (January 2014) concerned a case involving a request to the then Department for Business, Innovation and Skills (DBIS) for the names of companies that had applied for and been granted licences for the export of equipment with ML1, ML2 and/or ML3 ratings during 2009/2010. In response to that request DBIS provided

⁴ <https://ico.org.uk/media/for-organisations/documents/1204/information-in-the-public-domain-foi-eir-guidance.pdf>

the complainant with the names of companies who had applied for such licences and a table listing information about the licences applied for, including a description of the equipment listed on the licences. This information was not linked to the company names which were provided in a separate list. DBIS considered that they could not provide the information in the (linked) format requested as the information was provided in confidence.

46. In finding that the above information was exempt under section 41(1) the Commissioner was mindful that *'the majority of the companies have emphasised the importance of anonymity to ensure their security and, although the names of the companies have already been disclosed, releasing further information into the public domain about the nature of the licences issued to these companies would be likely to result in a detriment to the provider of the information'*. Similarly, in FS50590821 (November 2015), the Commissioner accepted that if information provided as part of the application process was disclosed and linked to specific companies this would undermine DBIS' confidentiality obligations and undermine this process.
47. Drawing parallels with the present case, DIT contended to the Commissioner that disclosure of the End-User destinations and Goods Ratings linked to company names constitutes, even if the licensing information is released separately from the company names, detailed export licence related information. The Department stated that this is particularly relevant in respect of the additional information that would be disclosed through the 'mosaic' or 'jigsaw' effect'.
48. It is important to be clear that the cases referenced above did not involve 'mosaic effect' arguments advanced by the public authority. Rather the Commissioner found that the *linking* of the actual export licence information requested (ie company name and equipment/end-user details) would be likely to result in a detriment to the provider of the information and undermine the confidentiality obligations of the public authority and consequently the licence application process. Similarly, in the present case, the Commissioner is satisfied that the withheld information would be exempt from disclosure under section 41(1) even without the mosaic effect arguments advanced by DIT.
49. The existence of the mosaic effect clearly increases the risk of divulging confidential and even more commercially sensitive export licence related information into the public domain, to the detriment of the companies concerned for the reasons advanced by DIT. However, the Commissioner considers that whilst the mosaic effect strengthens the application of section 41(1) to the information requested, it is not, in keeping with the Commissioner's previous decisions in similar cases, essential to the same. Therefore the Commissioner considers that the Department could have potentially withheld this type of *linked* export

licence application information under section 41(1) in the complainant's previous requests (but in the event they did not do so).

50. In submissions to the Commissioner DIT confirmed that they first became aware of the mosaic effect's application to the specific requested information in late 2016 through the concerns raised by companies via the trade association. At that point the Department developed a greater awareness and understanding that partial releases of export licence application information *'could enable the identification of additional information detrimental to a company using our searchable database and other information in the public domain'*. The Commissioner accepts that DIT only became aware of the mosaic effect since the Department last responded to the complainant's request for linked information of this type (by disclosing it in full) in February 2016.
51. However, the Commissioner is concerned with the consistency and coherence of the Department's central explanation as to why (in withholding the requested information other than the company names) they have departed from their previous well established practice of providing this linked information to the complainant in full without any exemptions being applied.
52. In submissions to the Commissioner DIT stated that:

'We would like to make it clear that we have not consulted with companies in respect of the request that is the subject of this complaint nor, with the exception of the request for information relating to applications for exports to Israel, have we consulted with companies in respect of any of (the complainant's) similar requests, e.g. where (the complainant) has requested the same information albeit in respect of a different year'.
53. The Department advised the Commissioner that during consideration of the complainant's previous requests they did not have strong enough reasons to exempt all, or part of this information under one or more of the exemptions in the FOIA. *'Consequently, because we were not considering whether an exemption applied to the names of the companies, we did not seek the views of the companies on disclosure'*. The Department contended that had they done so at the time, they consider, *'based on the expressions of concern that we have received since the time of the previous requests'*, the companies would have objected to disclosure and this, in turn, would have prompted DIT to consider whether section 41 (and section 43) applied to these earlier requests.
54. However, in their submissions to the Commissioner, DIT advised that they *had* received representations from exporters expressing concern about their information being disclosed under the FOIA in 2013 and

2014. DIT provided the Commissioner with copies of these representations which clearly show that the Department did consult with companies in respect of FOIA requests for export licence application information at that time.
55. In one letter dated 17 October 2013, a company responds to the Department, having been advised of an FOIA request for information as to the identity of companies that the Department had granted export licences in categories ML1, ML2 and/or ML3 during the period 2009/2010 (and specific requests about equipment supplied to the Bahrain government during the same period). The company makes very clear that they do not consent to the disclosure of their information and specifically claim both section 41 and section 43 of the Act.
 56. In another letter to the Department from another company, dated 13 September 2013, the company contend that their information (including the company name) should not be disclosed in response to a request for information for the names of the companies which had been awarded five standard individual export licences to Egypt and which were revoked in July 2013 on the instructions of the Business Secretary, Dr Vince Cable. This company also provides representations in support of applying sections 41 and 43. In an email to the Department on 1 October 2013, another company objects *'to any information being released regarding our name, our customers or products we supply'*.
 57. These letters/emails (amongst others) clearly show that the Department did consult with companies in relation to requests for information very similar to that requested by the complainant in this case for at least a few years prior to February 2016 (when the Department last provided the complainant with the information requested). The correspondence also shows that the companies themselves were very clear that they considered that their export licence related information was exempt under section 41 (and section 43).
 58. Given that the Department had received representations from companies in some of the years pre-dating 2016 requesting that their export licence related information not be disclosed in response to FOIA requests (ie the companies considered that such information was provided to the Department in confidence), the Commissioner asked the Department to explain why they had nevertheless chosen to disclose to the complainant the same information as requested in the present case for the past several years.
 59. The Department explained that *'at the time, ECO considered that it was in the public interest to release this level of information and that no FOIA exemptions applied to withhold it. The level of information requested was considered, at the time, to be a 'limited amount of*

information". The Department advised that, at the time, *'we did not consider that there was any harm from disclosing that a particular company had been granted a licence for military rated goods to a particular destination in the absence of any further licensing information being disclosed'*. However, it had since become apparent to the Department that this level of information could be used to obtain additional confidential and commercially sensitive licence application information through the 'mosaic effect'.

60. DIT confirmed that they did not previously consider section 41 as being relevant to the level of information requested by the complainant because *'at the time, we did not consider that there was any harm in disclosure of the level of information being requested'*. The Department advised that, in hindsight, *'we now recognise that both these sections (41 and 43) applied to the information (the complainant) requested previously. We acknowledge that these exemptions should have been considered at the time. Had this been the case we would have sought to withhold the information that was previously released to (the complainant) under both of these exemptions as we are seeking to do now'*.
61. DIT referred to the ICO guidance on 'Information in the Public Domain'⁵ which states that previous publication of (the same or same type of) information may indicate that no harm is likely, even if the information is in practice no longer available. In such cases the focus is likely to be whether there has been any change in circumstance since the previous disclosure that would now justify withholding the information, despite the fact it was previously considered appropriate for release.
62. In their internal review, DIT advised the complainant that ECO had considered that section 41 did not apply to the previous requests for the same level of information because *'although the information was information provided in confidence'*, ECO considered that the limited amount of information requested (eg name of company, end-user destination and rating) could be released.
63. The Commissioner is satisfied that at the time of the complainant's previous requests for information of the same type as that requested on 9 January 2017, the Department *did* consider the potential applicability of section 41 to the information concerned. Given the representations received from companies submitting that their export licence application information (in some cases even the company name) be exempt from

⁵ <https://ico.org.uk/media/for-organisations/documents/1204/information-in-the-public-domain-foi-eir-guidance.pdf>

disclosure under section 41 (and section 43) of the FOIA, it is not credible for the Department to claim that they did not consider whether these exemptions applied to the information or not.

64. Rather, it is clear that the Department recognised that the information had been provided in confidence by the companies but that the Department did not consider that any detriment/harm would be caused to the companies by disclosing the same. This, (possibly combined with the Department's then view that the information carried a public interest), is why the Department chose not to engage section 41 to withhold the information on those previous occasions.
65. However, whilst it is the existence of the mosaic effect, and the Department's post-2016 realisation of its applicability to the information type requested by the complainant, which is what DIT states to be the reason why they are now withholding the type of information which they disclosed in previous years, the Commissioner would note that the objections to disclosure from the companies concerned are wider in nature than the mosaic effect concerns raised by the trade association in its meeting with the Department in November 2016.
66. The copies of post-2106 written representations to the Department from the companies seen by the Commissioner deal mainly with the disclosure of export licence application information itself rather than concerns of a mosaic effect. The companies are concerned that disclosure would reveal details of the markets in which they operate, the reputational damage of being associated with exporting equipment to certain countries and such companies being targeted by protesters. In one email of 20 January 2017 to a company from the Department, in which the company is asked whether or not they would be content for their name to be released into the public domain, it is the Department, rather than the company, which raises the mosaic effect, advising the company that *'please note that release of this information could enable the requestor or any other member of the public (FOI releases are considered to be a general disclosure of information into the public domain) to cross reference this information with licensing information that HMG publish as official statistics in the Quarterly and Annual Reports on Export Controls'*.
67. The Commissioner would note that it is the Department's previous practice of disclosing this linked export licence application information to the complainant which has not only created an expectation of disclosure on the part of the complainant, but has significantly contributed to the mosaic effect. That is to say, export licence application information disclosed in previous years by the Department could be combined with information available from official statistics in the Annual and Quarterly Reports on Strategic Export Controls and on the Strategic Export Controls Reports and Statistics website. In addition, given the concerns

about disclosing such confidential information it is not clear, and DIT has not explained why, they disclosed the names of all the relevant applicant companies in their initial response to the complainant's request.

68. However, although the Commissioner has the above concerns about the consistency and coherence of the Department's submissions in this case, she accepts, as previously found in FS50525689 (March 2014) that if confidential linked export licence application information were disclosed, the commercial interests of the named companies would be compromised, potentially putting them at a competitive disadvantage and damaging their commercial relationships. The Commissioner also accepts, as previously found in FS50502939 (January 2014) that if information provided as part of the application process and linked to specific companies was disclosed it would undermine DIT's confidentiality obligations and undermine the export licence application process.

Is there a public interest defence for disclosure?

69. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the Department could successfully rely on such a public interest defence to an action for breach of confidence in this case.
70. In submissions to the Commissioner, the complainant stated that, *'there is unquestionable public concern and an overwhelming public interest in informed debate about UK arms exports. This is particularly the case where weaponry is sold to governments that are in conflict or have poor human rights records. These destinations comprise a substantial proportion of UK arms exports'*. The complainant noted that polling has consistently shown public opposition to much of the arms trade, and cited a survey of 2,000 people carried out by Opinium in February 2017 which *'showed that 71% of UK adults opposed arms exports to countries that have been accused of violating international humanitarian law, with only 5% supporting them'*.
71. The complainant noted that:
- 'There is currently particular concern over arms to Saudi Arabia due to its involvement in the devastating war in Yemen. According to the United Nations, over 10,000 people have been killed in the conflict, the majority of them by the Saudi-led bombing campaign. The bombardment has destroyed vital infrastructure including schools and hospitals. Millions of people are displaced and 80% of the population is in need of aid'*.

72. The complainant noted that the Government had acknowledged that UK built combat aircraft and missiles have been used by Saudi Arabia in airstrikes in Yemen. At the start of the conflict in 2015, the then Foreign Secretary, Philip Hammond, confirmed that the Saudi Royal Air Force were using UK manufactured arms in Yemen and stated that the UK would support the Saudi-led coalition against the Yemeni rebels 'in every practical way short of engaging in combat'⁶.
73. The complainant highlighted that the UK arming of Saudi Arabia received '*substantial attention during the 2017 general election, including the televised BBC leaders' debate*'. The complainant noted that a number of political parties, including Labour, the SNP and the Liberal Democrats, had said they would suspend arms sales to Saudi Arabia in the light of the conflict in Yemen. The complainant advised that, '*following the Judicial Review brought by CAAT over the issue, there was a parliamentary statement and debate in July 2017*'.
74. The complainant noted that Saudi Arabia is the UK's biggest arms customer and that export licence application information previously disclosed by the Department had shown that '*nearly 200 companies have applied for Military List export licences to the country since the start of 2008*'. The complainant contended that, '*a trade that has such devastating consequences and is of concern to a high proportion of the population and a large number of Members of Parliament should be subject to high levels of transparency to enable informed debate, scrutiny and accountability*'.
75. In their initial response of 6 February 2017, DIT stated that a duty of confidence exists and there was a strong public interest in protecting that confidence. They stated that, '*there are no public interest considerations in relation to this information requiring us to set the duty of confidentiality aside*'. The Department acknowledged a '*general public interest*' in the disclosure of the information, as greater transparency makes government more accountable, but considered that weighed against this was the public interest '*in ensuring that the commercial interests of external businesses or other organisations are not damaged or undermined by disclosure of information which is not common knowledge and which could adversely impact on future business*'.
76. The Department stated that '*general public interest*' arguments about the disclosure of what the Department licensed and what they do not

⁶ <https://www.telegraph.co.uk/news/worldnews/middleeast/yemen/11500518/UK-will-support-Saudi-led-assault-on-Yemeni-rebels-but-not-engaging-in-combat.html>

licence are answered by the general disclosure made by the Department in the publication of the Annual and Quarterly Reports on Strategic Export Controls. DIT noted that these reports were available to view at gov.uk and contained detailed information on export licences issued, refused or revoked, by destination, including the overall type (eg Military, Other) and a summary of the items covered by these licences.

77. DIT also advised that the assessment and decision whether to grant a licence is taken by Government and *'accordingly, it is this decision that should be held to account by interested parties (e.g. by the Committees on Arms Export Controls who can, and do, request additional information about particular licences of interest, and others, such as the media and members of the public). Consequently, we consider that this is where the public interest lies – with the assessment and decisions taken by Government, not in which named company applied to export military goods to a particular destination'*. However, the Commissioner would note that this position is not consistent with the Department's disclosure of all the names of the applicant companies to the complainant.
78. In their internal review of 27 April 2017, DIT confirmed that they did not consider that there were any *'specific public interest grounds'* that would override their duty of confidentiality to the companies concerned. They contended that although there is a general public interest in scrutinising UK export licensing activity, *'that public interest is already well served by the large amount of material that is already made public as official statistics. This published information clearly indicates what we allow to be exported and to where'*. DIT stated that it is important to remember that it is the Government that licences the exports, and that the companies had acted lawfully by applying for export licences.
79. In submissions to the Commissioner the Department acknowledged that there is a public interest *'in knowing what companies are exporting/transferring or seeking to export/transfer in relation to strategically controlled goods, software and technology, and, in respect of the information requested, End-User Countries and Goods Ratings provide an indication of what type of goods companies are seeking to export and to where'*.
80. However, against the above public interest, DIT contended that:
'There is a strong public interest in ensuring that the commercial interests of external businesses are not damaged or undermined by disclosure of information which is not common knowledge, and which could adversely impact on future business. The public interest is in the transparency of knowing what equipment was exported to which destinations and not in knowing which particular companies were involved in that activity. We facilitate the accountability and

transparency of the decisions we take by publishing official statistics on what we have issued, refused or revoked by destination'.

81. The Department further contended that, *'the public interest in this matter lies in knowing that the Government acted properly as it was the Government that authorised the exports through the licensing system, having assessed against the published Consolidated EU and National Arms Export Licensing Criteria. The companies acted legally by applying for licences which the Government assessed and granted'.*
82. With reference to the complainant's citation of the Department's Transparency Consultation or 'Transparency Initiative', the Department contended that this *'is not relevant to DIT's consideration or handling of requests made under the Act. The Transparency Initiative was not about FOIA. Reference was made to the introduction of the FOIA Declaration but the Initiative itself was fundamentally about increasing transparency of information in relation to the usage of Open Export Licences (e.g. making public more information about these licences)'.*
83. The Commissioner is surprised by the Department's contention and cannot agree with the same. The FOIA (without which the Transparency Initiative is unlikely to have been introduced), is fundamentally concerned with transparency and accountability, which was the stated purpose of the Transparency Initiative. There is also an inconsistency with the Department's rationale in this respect as the amount of information about export licences in the public domain clearly has an influence (as the Department has contended) on the public interest question (ie is the public interest in transparency and accountability of export licence applications already satisfactorily met through the information already accessible to the public and highlighted by DIT in their submissions).
84. In their submissions to the Commissioner the Department has been clear that they do not consider the information requested to carry a specific public interest and that the public interest *'is in the transparency of knowing what equipment was exported to which destinations and not in knowing which particular companies were involved in that activity'.* However, conversely, the Department has also confirmed to the Commissioner that this type of information was provided to the complainant in successive years prior to 2016 because at the time, *'ECO considered that it was in the public interest to release this level of information'.*
85. As previously noted, the Commissioner is satisfied that it was this consideration (that the information carried a public interest) coupled with the Department's belief that the level of information being requested would not prejudice or cause a detriment to the commercial interests of the companies, which led the Department to disclose this

type of export licence application information to the complainant in the years prior to 2016.

86. The Commissioner accepts that there is a public interest argument based around transparency of export licences, especially with regard to the export of military equipment and arms. In the Commissioner's view this public interest is increased where there is evidence which suggests that UK manufactured arms and equipment may be being used in conflicts (such as the war in Yemen) in contravention of international law and the UK's international, European and domestic obligations.
87. The Commissioner recognises and accepts that there is widespread public concern and disquiet about the UK's involvement in the exporting of arms and weaponry to countries which have been accused of violating international humanitarian law. As the complainant has noted, the public concern about the UK's arming of Saudi Arabia, particularly with respect to that country's involvement in the war in Yemen, is demonstrated by the issue being discussed by the party leaders during the 2017 general election televised leaders' debate (and subsequently in Parliament).
88. However, the Commissioner considers that the public interest in transparency and accountability of UK exports of military equipment and arms primarily lies with Government rather than the exporting companies concerned. The Commissioner considers it to be an important point that it is the Government that licenses such exports, and that companies (whatever the view many may have as to the ethics or morality of the arms trade) have acted lawfully by applying for such licences. To this extent, the Commissioner would agree with the Department's contention that *'the public interest is in the transparency of knowing what equipment was exported to which destinations and not in knowing which particular companies were involved in that activity'*.
89. The Commissioner is of this view, despite the Department having contradicted their own position by having stated that they previously considered it to be in the public interest to disclose this level of export licence application, and in providing the complainant with the names of the applying companies (and nothing more) in response to the request of 9 January 2017.
90. It is already publicly known that UK manufactured military equipment has been used by Saudi Arabia in Yemen, quite possibly in contravention or breach of international law and the UK Government's criteria for the granting of arms export licences. The disclosure of the withheld information would not advance or significantly inform the public debate on this highly controversial and topical issue. Nor would disclosure help show or determine whether any such breaches have taken place.

91. The above having been said, the Commissioner recognises that the involvement of many of these companies in the exporting of military equipment and arms will already be public knowledge (through the Department's previous disclosures of this type of information for example) even if the details are not. Where that is the case, the Commissioner considers that, given the highly contentious and controversial nature of the arms trade, such companies must expect to attract some level and degree of protest and disruption. Providing such action is not unlawful, it is entirely legitimate within a democratic and free society.
92. The Commissioner considers (as she has found in the previous aforementioned cases), there is a strong public interest in the export licence application process operating effectively and ensuring that exporters who are applying for licences properly and fully cooperate and engage with the Department. The Commissioner accepts that if information given as part of the export licence application process was disclosed and linked to specific companies this would undermine DIT's confidentiality obligations and undermine this process. Although the Department provided the names of the applicant companies to the complainant, releasing further information into the public domain about the nature of the licences issued to these companies would be likely to result, through the mosaic effect, in a detriment to the providers of the information.
93. The Commissioner considers that the legitimate and very important public interest in transparency and accountability of the UK's exports of military equipment and arms is proportionately and satisfactorily met through the Department's publication of Annual and Quarterly Reports on Strategic Export Controls. As the Department has noted, these reports contain detailed information on export licences issued, refused or revoked, by destination, including the overall type (eg Military, Other) and a summary of the items covered by these licences. The Commissioner notes that company names are not linked to licensing information included in the official statistics that HMG publishes relating to export licensing.
94. In weighing the above public interest arguments for and against disclosure, the Commissioner is mindful of the wider public interest in preserving the principle of confidentiality. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider.

95. The Commissioner acknowledges and appreciates that the complainant had an expectation of being provided with the requested information as this is what had happened for almost eight years previously. The change of approach by DIT does, to some extent, as the complainant has noted, represent '*a substantial and significant move away from transparency*' on the part of the Department. However, context is crucial here. The Commissioner recognises that there is already detailed and significant information in the public domain about UK exports in this field, which provides due and important transparency of government policy and decisions in this highly contentious and controversial area. Accountability of those policies and decisions is provided through the Committees on Arms Export Controls.
96. The Commissioner does not consider that any significant additional public interest would be served by the disclosure of export licence application information linked to specific companies. Any such additional public interest is outweighed by the strong public interest in the effective operation of the export licence application process.
97. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is not a valid public interest defence in this case.
98. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA and has not gone on to consider section 43(2).

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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

100. 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.

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

Signed

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF

