

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 April 2019

Public Authority: The Foreign and Commonwealth Office

Address: King Charles Street

London

SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) for information about export licenses. The FCO initially sought to withhold all of the requested information before providing the complainant with some of it. The FCO has sought to withhold the remaining information on the basis of sections 27(1)(a) (international relations), 36(2)(b)(i) and (ii), 36(2)(c) (effective conduct of public affairs), 41(1) (information provided in confidence) and 43(2) (commercial interests). The Commissioner has concluded that none of the exemptions cited by the FCO apply to the withheld information, with the exception of sections 36(2)(b)(i) and (ii). However, the Commissioner has concluded that the public interest favours disclosing the information which has been withheld on the basis of that exemption. Furthermore, the Commissioner has concluded that some of the information which the FCO redacted as being out of scope of the request falls within the scope. Finally, the Commissioner has concluded that the FCO breached section 10(1) of FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with further copies of the three documents it identified as falling within the scope of her request without any material being redacted on the basis of sections 27(1)(a), 36(2)(b)(i) and (ii), 36(2)(c), 41(1) and 43(2). In providing the complainant with these documents the FCO also needs to include the information identified in the confidential annex which is attached to this notice which the Commissioner considers to fall

within the scope of the request but which the FCO had previously redacted on the basis that it was out of scope.

3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant submitted the following request to the FCO on 21 September 2017:

'Thank you for your reply dated 18 August 2017, ref 0706-17. I am writing to ask some follow-up questions about the information provided in your response about the work of the Export Control Joint Unit in the period 1 July 2016 to 30 September 2016.

- 1) *I understand from your response that Criterion 2 assessments were conducted in relation to 27 applications in the period 1 July to 30 September 2016. I also see from HMG's quarterly licensing statistics relating to the same period that 73 SIELs were issued. Given that no licences were refused, I assume this was the total number of applications assessed in the period. Please could you tell me: on what basis were 27 applications assessed against C2, and the remaining 46 were not?*
- 2) *What were the specific C2 grounds on which six export licence applications were referred to FCO Ministers during this period? Please provide copies of any guidance or commentary provided by the FCO to Ministers and the Foreign Secretary.*
- 3) *What evidence sources were consulted in making the decisions to approve these six export licence applications?*
- 4) *What were the grounds on which the six licences were approved? Please provide copies of any guidance or commentary that accompanied the recommendation to officials at DIT in order to inform the final decision.¹*

¹ A copy of the FCO's previous response to this request can be located here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/641851/FOI_0706-17_response.pdf

The request concerns the UK arms export licensing processes with regard to Saudi Arabia, in particular criterion 2c of the Consolidated EU and National Arms Export Licensing Criteria

5. The FCO contacted the complainant on 19 October 2017 and confirmed that it held information falling within the scope of her request but it considered section 27 (international relations) of FOIA to apply and it needed additional time to consider the balance of the public interest test.
6. The FCO continued to send the complainant public interest test holding letters at approximately monthly intervals.
7. The FCO provided her with a substantive response to part 1 of the request on 12 April 2018. It subsequently provided her with a substantive response to parts 2, 3 and 4 of her request on 11 May 2018.² The FCO explained that the information sought by these parts of her request was considered to be exempt from disclosure on the basis of section 27(1)(a) and sections 36(2)(b) and (c) (the effective conduct of public affairs) of FOIA and that in all the circumstances of the request the public interest favoured maintaining the exemptions.
8. The complainant contacted the FCO on 26 June 2018 and asked it to conduct an internal review of this decision.
9. The FCO informed the complainant of the outcome of the internal review on 5 October 2018. The review upheld the application of the exemptions contained at sections 27(1)(a), 36(2) and (c) of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 26 September 2018 in order to complain about the FCO's handling of her request and its failure to complete the internal review. Following the completion of the internal review the complainant contacted the Commissioner again to explain that she was dissatisfied with its decision to withhold the information
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which states that the UK government will 'not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law'.

² The ICO had issued decision notice [FS50735301](#) on 19 April 2018 which required the FCO to provide the complainant with a substantial response to the outstanding parts of her request.

falling within the scope of parts 2, 3 and 4 of her request as well as the FCO's failure to complete the internal review within 40 working days.

11. During the course of the Commissioner's investigation of this complaint, on 28 February 2019 the FCO disclosed to the complainant copies of three documents it held falling within the scope of her request albeit with redactions made on the basis of sections 27, 36, 41(1) (information provided in confidence) and 43(2) (commercial interests).³
12. Following this disclosure of information the Commissioner confirmed to the complainant that she remained dissatisfied with the length of time it took the FCO to comply with her request, including its delays in disclosing the information which it provided to her. She also remained dissatisfied with the FCO's decision to rely on the exemptions cited to withhold the remaining information.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

13. In its correspondence with the complainant the FCO referred to sections 36(2)(b) and (c) of FOIA. These provide the following exemptions:

'(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'

14. In determining whether sections 36(2)(b) and (c) are engaged the Commissioner must determine whether the qualified person's opinion
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³ As discussed below it also transpires that the FCO redacted a small amount of information on the basis that it considered it to be out of scope of the request.

was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
15. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
16. With regard to the process of seeking this opinion the FCO explained that it had originally consulted the qualified person, namely a FCO Minister, on 9 May 2018 with regard to engaging the exemptions contained at section 36 of FOIA. The FCO explained that following further consultation and its decision to partially disclose the requested information, it had made a further submission to the Minister on 21 February 2019 in order to confirm the Minister's view as to whether section 36 still applied to parts of the withheld information. The Minister gave their opinion on 25 February 2019 confirmed that section 36 applied to some parts of the information which was still being withheld.
17. Turning to the substance of the opinion itself, although the submission provided to the Minister in February 2019 cited sections 36(2)(b)(i), (ii) and (c), in the Commissioner's view the arguments set out in the submission only relate to sections 36(2)(b)(i) and (ii). That is to say, the submission – to which the Minister agreed – argued that although much of the information within the scope of the request did not include substantive internal deliberations and could therefore be disclosed, parts of it referred to the thought process involved in arriving at the FCO's assessment of licence applications. The Minister argued that such information therefore formed part of the free and frank exchange of

views between officials and that disclosure of such information could risk the candour and frankness of similar discussions in the future. In the Commissioner's opinion such a line of argument focuses simply on the prejudicial effects sections 36(2)(b)(i) and (ii) are designed to protect. There is no clear argument in the submission to the Minister, or indeed in his opinion, as to what the 'other prejudice' could be that would be relevant to section 36(2)(c). In light of this the Commissioner has concluded that section 36(2)(c) is not engaged. However, the Commissioner does accept that it is reasonable for the qualified person to argue that disclosure of information relating to the internal discussions about the rationale behind the assessment of licensing particular applications could lead to a chilling effect on the candour of such discussions in the future, and in turn impact on both the free and frank provision of advice and the free and frank exchange of views.

18. Sections 36(2)(b)(i) and (ii) are therefore engaged.

Public interest test

19. Section 36 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information. If the public interest is equal on both sides, then the information must be released.

Public interest arguments in disclosing the information

20. The complainant argued that the release of the withheld information would allow observers to properly scrutinise government policy and hold the government to account, at a time when public concern about arms exports is high, and in the context of renewed UK commitments to human rights and international humanitarian law under the UN Arms Trade Treaty. The complainant noted that the Commissioner's guidance on the public interest test identified some of the arguments in favour of disclosure, in relation to: a general public interest in transparency; public interest in the issue; public interest in the information; suspicion of wrongdoing; and presenting a full picture.⁴ The complainant argued that in her view, all of these reasons in favour of disclosure are relevant to this case. Specifically, the complainant pointed to a high level of public interest in the issue and the requested information, given that

⁴ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

62% of people think selling arms to Saudi Arabia is unacceptable,⁵ and only 6% of UK adults believe it is acceptable to sell weapons to Saudi Arabia.⁶ Further, the complainant argued that in the context of US Congressional opposition to US military aid (including arms transfers) to Saudi Arabia, and the policy of several other EU Member States to deny arms exports to Saudi Arabia that could be used in the war in Yemen, the UK risks being out of step with public opinion and the practice of its partners on this issue.

21. In the context of section 36, the complainant argued that officials and ministers are acting in the public interest when they engage in deliberations. She suggested that disagreements, uncertainty, the need to make difficult decisions and tough choices, are all to be expected during the deliberation process. Moreover, she argued that the quality of democracy and transparency is *enhanced* when that is made public – it allows the public to see that officials and ministers are debating the issues properly.
22. The complainant argued that this is particularly the case in an issue area where there is a palpably perverse outcome, such as arms export policy. While the government has a clearly stated policy that it will not licence weapons transfers where there is a 'clear risk' that they 'might' contribute to serious violations of IHL, and claims to implement that policy robustly and rigorously against each of the named criteria, it has approved the ongoing, indeed exponentially increased, supply of weapons to Saudi Arabia and its coalition partners involved in the war in Yemen since 2015. The complainant argued that this ongoing situation has generated unprecedented public opposition – the controversy over arms sales to Saudi Arabia is the biggest arms trade controversy since the 'arms to Iraq' scandal of the 1980s. For this reason, the complainant argued that process of deliberation is as important as the outcome, and the process should be open to scrutiny and accountability as well. She argued that there needs to be a release of information relating to how the government has implemented its commitments, regarding the grounds for its decisions and the evidence sources consulted. The complainant suggested that if there are concerns about the right to privacy of officials there are ways to manage that, but any person acting in an official public capacity should expect to have the process and outcome of their decision-making scrutinised.

⁵ <https://www.theguardian.com/world/2017/feb/05/most-britons-believe-selling-arms-to-saudis-is-unacceptable>

⁶ <https://www.caat.org.uk/media/press-releases/2018-03-06>

Public interest in favour of maintaining the exemption

23. The FCO argued that there is a strong public interest in protecting a space in which Ministers and officials can discuss policy free and frankly to ensure the full and proper consideration of the options. It argued that any impact on the candour or frankness on the free exchange of ideas in the decision making process would not be in the public interest. The FCO emphasised that the candour and frankness of its internal deliberations over licensing to Saudi Arabia were strongly welcomed in the recent Judicial Review brought by Campaign Against Arms Trade (CAAT). The Divisional Court judgment noted the Government's decision-making process as 'highly sophisticated, structured and.... Multifaceted' with all the hallmarks of a rigorous and robust, multi-layered process of analysis.⁷ The FCO argued that the licensing of controlled goods to Saudi Arabia remains a finely balanced decision and it believed that any loss of such candour would have an adverse impact on the robustness of its decision making and strengths of its current process of assessing export licence applications.

Balance of the public interest arguments

24. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, she will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure.
25. The Commissioner has carefully considered the information which the FCO is seeking to withhold on the basis of sections 36(2)(b)(i) and (ii). In her view this would provide a direct insight into the questions posed by the complainant's request. The Commissioner also considers that the complainant has set out a strong case for why disclosure of the information sought by her request would be in the public interest. More specifically, the Commissioner considers there to be particular merit in her argument that for the public to have confidence in the government's process for reviewing such applications it needs to understand the nature of the process itself and how decisions are made within it. Furthermore, the Commissioner recognises that the government's

⁷ <https://www.caat.org.uk/resources/countries/saudi-arabia/legal-2016/2017-07-10.judgment.pdf>

decision to continue to approve licences for arms exports to Saudi Arabia despite the war in Yemen, has attracted notable criticism from some parties, and in her view this adds further weight to public interest in the disclosure of this information.

26. With regard to the attributing weight to the public interest in maintaining the exemptions, the Commissioner accepts that disclosure of the withheld information does pose *some* risk of having a chilling effect on the future discussions of licence applications in the future. In reaching this view she accepts that for the process of reviewing license applications to work effectively officials need to be able to undertake candid and free assessments and discussions, especially in respect of high profile or controversial applications such as those to Saudi Arabia during the ongoing civil war in Yemen. The Commissioner also notes that the request was submitted in September 2017 and the withheld information relates to discussions that took place just over 12 months previously and thus disclosure of the information would result in the disclosure of discussions which were relatively recent. However, having carefully considered the content of the information withheld on the basis of section 36 the Commissioner has some reservations as to the severity of such a chilling effect. In order to fully explain her position in respect of this point the Commissioner needs to make reference to the withheld information itself, which clearly cannot be done in this decision notice. Therefore, the Commissioner has set out in a confidential annex, a copy of which will be provided to the FCO only, why in her view any chilling effect that would occur would not be a very severe one.
27. In light of this finding, and taking into account the considerable public interest which the Commissioner considers there to be in the disclosure of the information, she has concluded that the public interest in disclosing the information outweighs the public interest in maintaining the exemptions contained at sections 36(2)(b)(i) and (ii).

Section 27 – international relations

28. The FCO argued that part of the withheld information is exempt from disclosure on the basis of section 27(1)(a) of FOIA which states that:

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

(a) relations between the United Kingdom and any other State'

The FCO's position

29. The FCO argued that this exemption recognises the need to protect information that be likely to prejudice relations between the UK and other states if it was disclosed. In this case, the FCO argued that release of the withheld information would be likely to prejudice the UK's relations with Saudi Arabia as disclosure of this information would damage undermine the trust and confidence between the two countries.

The Commissioner's position

30. In order for a prejudice based exemption, such as section 27(1) to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
31. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance '*if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary*'.
32. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCO clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect.
33. However, having carefully considered the withheld information the Commissioner is not persuaded that there is a causal link between the disclosure of the information and harm occurring to the UK's relations with Saudi Arabia. In order explain this finding the Commissioner has to

make reference to the content of the withheld information and therefore has elaborated on this finding in the confidential annex.

Section 43(2) – commercial interests

34. The FCO has withheld the licence numbers and product names on the basis of section 43(2) of FOIA.

35. This exemption states 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).'

36. As section 43(2) is a prejudice based exemption the Commissioner must consider the three limb test set out above at paragraph 30 in order to determine whether the exemption is engaged.

37. In its submissions to the Commissioner the FCO did not provide any arguments to explain why it considered section 43(2) to apply and nor is it apparent to the Commissioner why such information would in fact prejudice a party's interests if it was disclosed. (She notes that the product names in question are already in the public domain). Therefore, the Commissioner must conclude that section 43(2) is not engaged and does not provide a basis to withhold the information to which the FCO applied it.

Section 41 – information provided in confidence

38. The FCO argued that the product names were also exempt from disclosure on the basis of section 41(1) of FOIA.

39. This section states that:

*'(1) 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.'*

40. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.

41. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in

Coco v A N Clark (Engineering) Ltd [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- Whether the information had the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether an unauthorised use of the information would result in detriment to the confider.
42. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.
43. As with its approach to section 43(2), the FCO did not provide the Commissioner with any submissions to explain why it considered section 41(1) of FOIA applied to the product names. The Commissioner assumes that the product names were provided to the FCO by a third party, presumably the party which applied for the licence and on that basis it could be argued that the requirement of section 41(1)(a) is met. However, without any submissions from the FCO the Commissioner has no option but to conclude that section 41(1)(b) is not met.

Information marked as out of scope

44. As noted above, the FCO also redacted certain information from the documents provided to the complainant on the basis that they considered such information to be out of the scope of the complainant's request.
45. The Commissioner has carefully considered the wording of the complainant's request and the information which the FCO has redacted on the basis that it is out of scope. Having done so she accepts that the majority of this information relates to other licence applications and therefore is out of scope of the request. However, in the Commissioner's view some parts of the redacted information are relevant to the guidance or commentary sought by the complainant's requests. The Commissioner has identified such information in the confidential annex. As the FCO has not applied any exemptions to this information it needs to be disclosed to the complainant.

Section 10 – Time for compliance

46. Section 1(1) of FOIA provides a requester with two rights of access (a) to be informed whether a public authority holds the requested information and (b), if so, to have that information disclosed to them.
47. Section 10 of FOIA requires a public authority to comply with section 1(1), subject to application of any exemptions within, 20 working days.
48. With regard to the information which the FCO disclosed to the complainant during the course of her investigation, ie the disclosure made in February 2019, this case clearly not provided to the complainant within 20 working days of the request. Therefore, the FCO breached section 10(1) by not disclosing this information within this timeframe.⁸

Other matters

49. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days. In the circumstances of this case the FCO took 73 working days.
50. The Commissioner wishes to also draw attention to the fact that this delay with the internal review was symptomatic of the FCO's delays in handling this request and subsequent complaint. As the Commissioner's previous decision notice, FS50735301, found the FCO breached section 17(3) by failing to complete its public interest test considerations within a reasonable timeframe and it took the FCO four months to provide the Commissioner with a response to her enquiries, and this was only after the Commissioner served the FCO with an Information Notice under section 51 of FOIA compelling it to respond to her letter. Such delays – in terms of the FCO's response to a request and its engagement with the Commissioner - serve to frustrate a requester's right of access

⁸ The Commissioner has already found that the FCO breached section 17(3) of FOIA in decision notice [FS50735301](#) by failing to complete its public interest deliberations within a reasonable time.

information. She would hope that such delays, particularly at all points of request and any subsequently complaint, are not repeated by the FCO in the future.

Right of appeal

51. 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

52. 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.
53. 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

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