

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 November 2019

Public Authority: Department for International Trade

Address: 3 Whitehall Place

London
SW1A 2AW

Decision (including any steps ordered)

1. The complainant has requested information on a meeting between the Department for International Trade ("DIT") and BAE Systems.
2. The Commissioner's decision is that DIT has appropriately applied sections 27(1) – International relations and 43(2) – Commercial interests. She has determined that there is not an overriding public interest in disclosure of this specific information and the public interest therefore favours maintaining the exemptions. DIT is correct in its application of section 40(2) – Personal information, to withhold one name.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 8 April 2019 the complainant wrote to DIT and requested information in the following terms:

"I would like to request a full copy of the minutes of the meeting held between the Secretary of State of the DIT and representatives of BAE, on 29.10.19, to discuss the government's response to the murder of Jamal Khashoggi, and BAE Saudi interests."
5. DIT responded on 4 June 2019 responded and provided some heavily redacted information and a refusal notice in reliance of sections 27(1), 35(1)(a), 40(2) and 43(2).

6. The complainant requested an internal review on 5 June 2019 in doing so he explained:

"I would like the department to consider whether the Saudi authorities are likely to have accepted that the murder would inevitably have had a detrimental impact on its bilateral relationships with the other states, and whether this is likely to be exacerbated by the disclosure of the unredacted minutes."

7. Following the intervention of the Commissioner, DIT provided an internal review on 8 August 2019 upholding the initial response, save disclosure of the Special Advisor's name previously redacted.

Scope of the case

8. The complainant contacted the Commissioner on 14 August 2019, following the provision of the internal review, to complain about the way his request for information had been handled. The complainant explained:

"The DIT has set out very clearly the way in which it weighed the competing interests before withholding information under those sections that are subject to a public interest test.

However, because I cannot see the redacted information, I cannot be sure whether or not others outside the department, on seeing the unredacted minutes, might conclude that there is an overriding public interest in disclosure of some or all of the information that is being withheld."

9. In its submission to the Commissioner DIT explained that having reconsidered the withheld information it had determined that only paragraphs 1, 2, 3, 4, and 9 fall within the scope of the request. DIT also advised the Commissioner that it considered the exemption at section 41- Information provided in confidence applied to some of the information.
10. Having viewed the withheld information the Commissioner agrees that the information contained in paragraphs 5 – 8 of the meeting minutes falls outside the scope of the request.
11. The Commissioner therefore considers that the scope of her investigation is the application of the original exemptions relied on by DIT (sections 27, 35, 43 and 40) to the information contained in paragraphs 1-4 and 9 of the meeting minutes. As no information is withheld solely in reliance of section 41, she will only consider this if she concludes that the other exemptions do not apply.

Reasons for decision

Section 27 – international relations

12. Section 27(1)(a) FOIA 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,

13. The exemption focusses on whether UK interests abroad, or the international relations of the UK, would be prejudiced through the disclosure of the information relating to the issue.

14. The Information Tribunal¹ has also acknowledged that the nature of the prejudice under section 27(1) is specific to international relations; in particular, the relations and interests of the UK rather than the interests of individual companies or enterprises. Nevertheless, the Commissioner also acknowledges that it may be appropriate for a public authority to apply the exemption where a large business’s interests are inextricably linked to the wider relations and interests of the UK.

14. In order for a prejudice based exemption, such as sections 27(1)(a), 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,

¹ [Campaign against Arms Trade v the Information Commissioner and Ministry of Defence EA/2007/0040 \(26 August 2008\)](#).

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.

15. 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*'.²
16. With regard to the first criterion of the three limb test described above, the Commissioner accepts that potential prejudice to the UK's relations with the other states referenced in the information clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect.
17. With regard to the second criterion, in light of DIT's submissions and given the content of the, albeit very brief, redacted information in paragraphs 2, 3 and 9, the Commissioner is satisfied that disclosure of this information (which she has examined) clearly has the potential to harm the UK's relations with other states, including Saudi Arabia. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of this withheld information and the interests which section 27(1)(a) is designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which DIT believes would occur can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations with other states more difficult and/or demand a particular diplomatic response.
18. In relation to the third criterion, the Commissioner accepts that in the circumstances of this case the higher threshold of likelihood is met and she agrees with DIT that disclosure of the information would prejudice the UK's relations with other states. Again, the Commissioner's reasoning for reaching this conclusion is based upon the content of the

² *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* (EA/2006/0040), paragraph 81.

information and DIT's submissions. She cannot further explain her rationale without revealing the nature of the redacted information. The Commissioner recognises that this may prove frustrating to the complainant.

Public interest test

19. Section 27 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in favour of disclosing the information

20. DIT acknowledged that disclosure of the withheld information would increase public knowledge about UK relations with other states, including the Kingdom of Saudi Arabia.

21. The complainant explained to the Commissioner:

"I do not believe that I need to labour any points about the murder of Mr Khashoggi, and the enormous public interest in the public learning as much as possible about both the crime, and matters that arose in consequence of it."

Public interest in favour of maintaining the exemption

22. DIT explained its view that the effective conduct of international relations depends on maintaining trust and confidence between governments. It explained that in regard to defence matters ongoing engagement between government or other states and defence companies is a key component in building and maintaining effective relationships. Such relationships, conducted with a expectation of confidentiality among the parties, would be damaged by disclosure. DIT argued that it was clearly against the public interest to harm the UK's ability to maintain effective relations including diplomatic relationships with other countries.

Balance of the public interest

23. In this case the Commissioner clearly recognises the importance of the issues surrounding the death of Mr Khashoggi. Notwithstanding this, she must also recognise the importance of any prejudice which may be caused to the UK's international relations. The Commissioner understands the complainant's concerns and she has given great consideration to the redactions made by DIT.

24. In the Commissioner's view a significant amount of weight should be attributed to the public interest in the UK maintaining strong and effective relations with other countries, including the Kingdom of Saudi Arabia.
25. The Commissioner nevertheless accepts the complainant's argument that the public interest in understanding the circumstances of the crime and the consequent matters arising must carry weighty consideration. Therefore the public interest in disclosure of the redacted information should not be dismissed lightly.
26. The Commissioner, having examined the information, is not convinced that disclosure of the redacted information would address the complainant's particular concerns. Despite the title of the DIT meeting with BAE Systems ("BAE"), as listed³ in Government transparency data; "To discuss the UK Government response to the killing of Khashoggi and BAE Saudi interests"; the minimal content of the minutes provides little, if any, information on the Government's response.
27. Therefore, in light of the considerable weight to be attributed to the public interest in avoiding prejudice to the UK's relations with other states, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the redacted information.

Section 43 – Commercial interests

28. Section 43(2) states :

"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)."

29. In order for the section 43(2) exemption to be engaged the three criteria set out above in paragraph 14 must also be met here.
30. DIT explained its view that the commercial interests of BAE would be prejudiced and damaged by disclosure of the information in points 1, 4

3

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/788337/dit-ministers-quarterly-return-october-december-2018-meetings.csv/preview

and 9 of the withheld information. It explained that its application of the exemption was carefully considered and as a result considers that prejudice would result from the potential loss of future contracts and reduced profitability ultimately resulting in the loss of many individuals' jobs across the UK directly and indirectly employed by BAE. DIT also explained that its Defence and Security Organisation⁴ ("DSO") has an ongoing relationship with BAE and is "well aware of the company's concerns regarding protection of information."

31. The Commissioner notes that DIT has based its arguments for relying on section 43 on the impact resulting from the effect of disclosure on BAE's customers and their confidence in continuing to conduct business with BAE. DIT has not provided the Commissioner with a direct response or correspondence from BAE itself, however, she is prepared to accept that the DSO is able to provide an informed view of the organisation's opinion.
32. With regard to the first criterion of the three limb test set out in paragraph 14, the Commissioner accepts that the harm alleged to occur, as described above, relates to the commercial interests which the exemption contained at section 43(2) is designed to protect.
33. The Commissioner considers that the second criterion of the test is met with regard to the limited amount of withheld information on the basis that the information concerns markets explored by BAE and the potential to prejudice BAE's commercial interests.
34. In its submission to the Commissioner DIT advised that it considers disclosure would prejudice BAE's commercial interests. As stated in paragraph 14 this higher level of anticipated prejudice must be more likely than not. The evidence provided by DIT in support of this was limited. Nevertheless, the Commissioner accepts the higher level of prejudice based on her own determination following consideration of the information.

Public interest test

35. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

⁴ The Defence & Security Organisation is an organisation within the Department for International Trade responsible for helping British defence and security companies to export.

Public interest in favour of disclosing the information

36. DIT explained to the Commissioner in the same terms as it explained to the complainant in the internal review, stating:

“The factors in favour of disclosure of this information, including the general public interest test, were carefully weighed....”

37. The Commissioner notes that in its initial response to the complainant, DIT advised:

“We appreciate that there is a public interest in understanding the nature of commercial deals, and of Government interaction with the companies making those deals.”

38. The Commissioner would suggest that there is also the public interest in understanding any commercial impact on BAE as a result of the crime committed which could potentially result in, for example, job losses in the industry.

Public interest in favour of maintaining the exemption

39. DIT explained its view that there is a:

“need to allow business people and commercial organisations the space to conduct their lawful business competitively and without fear of disclosure of sensitive commercial information.”

40. DIT also explained that the failure to protect commercially confidential information:

“would limit the source of information and interlocutors available to the Department and limit the Department’s ability to promote the UK economy and support UK business overseas.”

Balance of the public interest

41. In considering whether there is an overriding public interest in providing the information withheld in reliance on this exemption the Commissioner has taken into account the limited arguments put forward by DIT.

42. The Commissioner understands that the complainant’s view is not specifically related to the individual exemptions relied on by DIT but rather relies on the overall public interest in the public being made aware of the outcomes and consequences of Mr Khashoggi’s death.

43. The Commissioner has viewed the withheld information and is satisfied that disclosure of the information would add very little to the public’s understanding of any consequences following Mr Khashoggi’s death. In

this respect she considers that very little weight can be attributed to disclosure.

44. The Commissioner recognises that it is often in the public interest to maintain the section 43(2) exemption in order to avoid prejudice to the commercial interests of a private sector organisation. She acknowledges the relationship between DIT and BAE, however, BAE's commercial interests should not be prejudiced by its involvement with a Government department. Clearly DIT holds commercial information, albeit limited, created during its meeting with BAE, which is not in the public domain.
45. In the circumstances of this case the Commissioner is satisfied that, on balance, the public interest favours maintaining the exemption.

Section 40 – Personal information

46. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
47. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
48. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
49. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.
50. DIT relied on section 40(2) to withhold the name of a junior DIT official.
51. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
52. Consequently the Commissioner accepts that the Private Secretary's name is personal data.
53. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

54. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

Lawful processing: Article 6(1)(f) of the GDPR

55. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.

56. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”⁵ .

57. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;

Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

58. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

⁵ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

Legitimate interests

59. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
60. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
61. In the circumstances of this case the Commissioner notes that the complainant is not specifically requesting information identifying individuals. However, in requesting his internal review the complainant commented:

"...the names of the Private Secretary and Special Advisor to the Secretary of State have been redacted despite having been made public – by the Secretary of State – in the Commons and on social media."
62. In providing its internal review DIT disclosed the name of the Special Advisor, acknowledging that this name was already in the public domain. However, DIT confirmed to the Commissioner that the Private Secretary's name was not that of Dr Fox's Principal Private Secretary, a Senior Civil Servant, whose name is in the public domain.
63. DIT confirmed that the Private Secretary is a junior member of staff with no expectation of disclosure of their name. DIT explained:

" ..having taken into consideration the nature of the request and the responsibilities of the employee in question, we do not consider the right of public access to official information to outweigh the right of junior members of staff to have their personal information protected."
64. The Commissioner acknowledges that there is an underlying legitimate interest in openness and transparency. However, it is also important to note that section 40 is different from other exemptions in that its consideration does not begin with an expectation of disclosure. As section 40 is the point at which the FOIA DPA interact, the expectation is that personal data will not be disclosed unless it can be demonstrated that disclosure is in accordance with the DPA.
65. The Commissioner therefore considers that there is limited legitimate interest in disclosure of this information.

Is disclosure necessary?

66. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
67. In the circumstances of this case, the Commissioner has identified that whilst there is a legitimate interest in ensuring accountability and transparency on the part of DIT, she is not convinced of the necessity in the disclosure of the withheld name as she considers this to add little to the substantive content of the information.
68. The final stage of the three part test, set out above, is to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. For the sake of completeness the Commissioner has gone on to consider the impact of disclosure.
69. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to their professional role or their private life, and the purpose for which they provided their personal data.
70. The Commissioner notes that the junior official concerned is not in a public facing role and therefore has an expectation that their name will not be put into the public domain. The Commissioner accepts that even though the information relates to their public, rather than private, life the individual would have a reasonable expectation that this would not be disclosed, based upon established custom and practice.
71. The Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms, and that the disclosure of the information therefore would not be lawful.
72. Given the conclusion reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair.
73. The Commissioner therefore upholds the application of section 40(2).

Section 35 – Formulation of government policy and Section 41 – Information provided in confidence

74. DIT also sought to rely on section 35 and section 41 in respect of three points of the minutes of the meeting, however, the Commissioner has not considered these exemptions as she has determined that all the

Reference: FS50858528



information is appropriately withheld in reliance of either section 27,
section 43 or section 40.

Right of appeal

75. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

76. 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.

77. 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

Susan Hughes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF