

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 July 2022

Public Authority: Department for International Trade

Address: Old Admiralty Building

Admiralty Place

London

SW1A 2DY

Decision (including any steps ordered)

1. The complainant made a five-part request for information on applications made by, and licences granted to, a specified company for exports related to Hornet Bomb Rack/Hornet Missile Launcher, between 2014-present to certain named countries. The Department for International Trade ('DIT') provided the information related to Turkey in tabular form in response to parts 1-4 of the request and said some of the information was not held (part 1). DIT refused to provide some of the requested information (for the remaining countries for parts 1-4), citing section 22 of FOIA (information intended for future publication). For the remaining requested information (part 5), DIT cited sections 40 (personal information), 41 (information provided in confidence) and 43 (commercial interests). At the internal review stage, the complainant stated that he did not wish to challenge DIT's reliance on section 40 of FOIA, so this aspect has not been considered further. Given that the complainant has neither complained about the disclosed information nor DIT's statement that some of the requested information was not held for part 1 of his request, the Commissioner has excluded these elements from his investigation.
2. During the course of the Commissioner's investigation, (whilst maintaining that section 22 applied), DIT additionally cited section 36(2)(c) of FOIA (prejudice to the effective conduct of public affairs) and section 44(1)(a) (prohibitions on disclosure) for the remaining withheld information in parts 1-4 of the request.

3. The Commissioner's decision is that DIT was entitled to rely on section 44(1)(a) of FOIA for the remainder of part 1-4 of the request. He has not deemed it necessary, therefore, to consider DIT's reliance on sections 22 and 36 of FOIA.
4. For part 5 of the request, the Commissioner finds that DIT was entitled to rely on section 41 of FOIA. He has therefore, not considered DIT's citing of section 43 any further.
5. The Commissioner does not require any steps as a result of this notice.

Background

6. DIT has overall responsibility for the statutory and regulatory framework of export controls, and for decisions to grant or refuse an export licence. The Commissioner understands that the Foreign and Commonwealth Office and Ministry of Defence are DIT's principal advisers, advising on the Strategic Export Licensing Criteria¹, which are used to assess licence applications.

Request and response

7. On 11 January 2021, the complainant wrote to DIT via the WhatDoTheyKnow.com website and requested information in the following terms:

"With reference to your advice and assistance in IR2020/06295

Please provide in the form of a table.

1. The numbers of applications made by EDO MBM Technology Ltd, for exports related to Hornet Bomb Rack/Hornet Missile Launcher, between 2014-present, to the following countries, Turkey Ukraine Libya Azerbaijan
2. Dates (D/M/Y) of each application plus completion dates (D/M/Y) for each licence

¹ <https://questions-statements.parliament.uk/written-statements/detail/2021-12-08/hcws449>

3. Information showing how many of these applications were, granted, refused, stopped, revoked, withdrawn (or any other relevant description).
 4. Information as to the current status of licences granted (i.e. extant, exhausted, expired or any other relevant description)
 5. Separately to the above table, full copies of any documents referring to "Bayraktar", "TB2", "UAV", "Karayel", "ANKA", [various unmanned aerial vehicle systems or drones] in any licence application documents found within the scope of points 1 to 4 above."
8. DIT responded on 5 February 2021. It provided some of the requested information (in tabular form) in response to some of parts 1-4 of the request, specifically information about "applications made by EDO MBM Technology Ltd, for exports related to Hornet Bomb Rack/Hornet Missile Launcher, between 2014-present" to Turkey. DIT explained that the disclosure did not include information about any applications that might currently be under consideration because any such applications would be exempt from disclosure by virtue of section 22 (information intended for future publication).
 9. DIT also said it held no information for "applications made by EDO MBM Technology Ltd, for exports related to Hornet Bomb Rack/Hornet Missile Launcher, between 2014-present" to the Ukraine, Libya or Azerbaijan (part 1 of the request).
 10. As above, DIT withheld some information from parts 1-4 of the request, advising the complainant that this information was exempt by virtue of section 22 of FOIA.
 11. For part 5 of the request, (ie "full copies of any documents referring to "Bayraktar", "TB2", "UAV", "Karayel", "ANKA", in any licence application documents found within the scope of points 1 to 4 above"), DIT refused to provide the information, citing the following FOIA exemptions:
 - Section 40 (personal information).
 - Section 41 (information provided in confidence).
 - Section 43 (commercial interests).
 12. DIT considered that the associated public interest tests for sections 22 and 43 favoured maintaining the exemptions and thereby it withheld this requested information. Section 41 is an absolute exemption and therefore does not require a public authority to carry out a 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.

13. The complainant requested an internal review on 10 April 2021, focussing only on the public interest tests. He confirmed that he did not wish DIT to review its citing of section 40 (applied to part 5 only).
14. Following its internal review, DIT wrote to the complainant on 29 April 2021, maintaining its original position.

Scope of the case

15. The complainant contacted the Commissioner on 27 May 2021 to complain about the way his request for information had been handled. His initial complaint centred on DIT's reliance on section 22 and his view that DIT had not made it clear which parts of his request this applied to. The Commissioner asked DIT to consider this as part of its investigation response.
16. Having received the Commissioner's initial letter of 7 March 2022 which set out the scope of his intended investigation, the complainant advised that he wished to provide additional submissions in support of his complaint.
17. The complainant did so on 5 April 2022. He provided some chronology prior to submitting the request under consideration here. He also told the Commissioner that his section 22 wording used at internal review had not been clear. His explanation included the following:

"What I was trying to establish was what part of the withheld information under section 22 was actually intended for publication as the scope of my FOIA request went beyond information that would normally be published by DIT in its quarterly and annual reports of export licence statistics. For instance, DIT does not normally publish details of specific companies or specific equipment or components in these quarterly and annual reports. There appears to be no other channel of publication other than these reports..." .

18. He also argued that the associated public interest test should favour disclosure.
19. The Commissioner has noted the complainant's view above and taken it into account in reaching his decision in this case.

20. The Commissioner further notes that the complainant has not challenged DIT's handling of some of the request, namely the information provided in relation to Turkey and confirmation that no information was held in relation to the Ukraine, Libya or Azerbaijan, so these aspects have not been considered any further.
21. Although the complainant challenged only DIT's assessment of the public interest tests for sections 22 and 43 of FOIA at internal review, the Commissioner must first consider whether the exemptions are engaged before he can assess whether a public authority has correctly balanced the associated public interest tests.
22. During the course of the Commissioner's investigation, DIT reconsidered its position. On 6 May 2022, DIT informed the Commissioner that in addition to relying on section 22 for the undisclosed information (in parts 1-4 of the complainant's request), it was now additionally citing sections 36(2)(c) of FOIA (prejudice to the effective conduct of public affairs) and 44(1)(a) (prohibitions on disclosure).
23. The Commissioner noted that DIT had not informed the complainant about the newly cited exemptions (as had been set out in the Commissioner's initial letter to DIT). He repeated his request for DIT to do so. Subsequently, DIT wrote to the complainant but not until 26 May 2022.
24. On 27 May 2022, the complainant wrote to the Commissioner objecting to DIT's additional reliance on both sections 36 and 44 of FOIA.
25. In this case, the Commissioner set out to consider whether DIT was entitled to rely on sections 22, 36 and 44 of FOIA for the remaining withheld information in parts 1-4 of the request. He also set out to examine whether DIT has properly applied sections 41 and 43 of FOIA to part 5 of the request.

Reasons for decision

26. The Commissioner has first considered DIT's reliance on section 44(1)(a) of FOIA which was applied to some of parts 1-4 of the request (some of the information having been disclosed in response to the request in relation to Turkey).

Parts 1-4 of request - section 44 – prohibitions on disclosure

27. Section 44(1)(a) of FOIA provides:

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it – (a) is prohibited by or under any enactment.”

28. Section 44 is a class based exemption which means if the requested information falls within the class of information described in section 44(1)(a), the exemption is engaged. As section 44(1)(a) is also an absolute exemption, it is not subject to any public interest considerations.

Is disclosure prohibited by or under any enactment?

29. Information is exempt under section 44(1)(a) if its disclosure would breach any of the following:

- primary legislation (an Act of Parliament); or
- secondary legislation (a Statutory Instrument).

30. DIT has advised that the statistics relevant in this case are the Annual and Quarterly Reports on Strategic Export Controls published by DIT, which contain detailed information on export licences issued, refused, or revoked by destination including the overall value, type (eg Military, Other) and a summary of the items covered by these licences. They are available to view online².

31. In citing section 44(1)(a), DIT has explained:

‘The Statistics and Registration Service Act 2007 (‘SRS’)³ prohibits disclosure of the requested information. Section 13(1) of the SRS⁴ compels producers of National Statistics⁵ to comply with the Code of Practice for Statistics (the Code⁶). Compliance with the Code is therefore required under the SRS in order for statistics to retain their designation as National Statistics. [Sic] both legally binding.

² <https://www.gov.uk/government/collections/strategic-export-controls-licensing-data>

³ <https://www.legislation.gov.uk/ukpga/2007/18/contents>

⁴ <https://www.legislation.gov.uk/ukpga/2007/18/section/13>

⁵ National Statistics is the term used under the SRS. In this response a reference to Official Statistics is also a reference to National Statistics

⁶ <https://code.statisticsauthority.gov.uk/>

The Code sets the standards that producers of official statistics should commit to. Compliance with the Code gives the public confidence that published government statistics have public value, are high quality, are accurate and are produced by people and organisations that are trustworthy.

The Code states that:

“T3.3 Access to statistics before their public release should be limited to those involved in the production of the statistics and the preparation of the release, and for quality assurance and operational purposes. Accurate records of those who have access before they are finalised should be maintained.

T3.4 The circulation of statistics in their final form ahead of their publication should be restricted to eligible recipients, in line with the rules and principles on pre-release access set out in legislation for the UK and devolved administrations. The details of those granted access should be recorded, together with clear justifications for access. No indication of the statistics should be made public and the statistics should not be given to any other party without prior permission for access. The list of recipients should be reviewed regularly and kept to a minimum.”

It would not be possible for DIT to release the information requested, that is information relating to license applications of a specific company, without also releasing the corresponding figures. This information is inseparable.

Information released in response to a freedom of information request is considered to have been released to the public at large. If DIT were to respond to this request, and similar requests, by releasing the withheld information, then we would, through a small number of requests, be providing an indication of the statistics. The Code clearly states that “[n]o indication of the statistics should be made public...”.

In addition to the specific use of the word “indication” of the statistics, the clear overall intention of section T3 of the Code (‘Orderly Release’)⁷ is to ensure that official statistics are made

⁷ <https://code.statisticsauthority.gov.uk/the-code/trustworthiness/t3-orderly-release/>

available to all users simultaneously upon publication. Release of this information prior to publication of the official statistics would have breached the Code, the Pre-release Order and by extension the SRS.

...DIT acknowledges, that not all the requested information will be published. However, due to the inseparable nature of the information that will not be published we consider that s.[section] 44(1)(a) applies to the information until such time as the official statistics within which a particular license application is included within, have been published.'

32. In further correspondence with the Commissioner, DIT said:

'The information requested by [the complainant] makes up a component part of the figures included within the strategic export controls licensing statistics, which is an official statistics publication produced in accordance with the Code of Practice for Statistics.

Although the specific information requested is not included within the publication, as the information requested would require the provision of figures which are a subset of and therefore a component part of the figures included within this publication, the release of these would give a direct indication of figures intended for publication prior to their release.

In accordance with section T3 of Code of Practice for Statistics ('Orderly Release'), specifically T3.4, no indication of the statistics should be made public and the statistics should not be given to any other party without prior permission for access. In addition to the specific wording around an "indication" of the statistics, the clear overall intention of section T3 is to ensure that Official Statistics are made available to all users simultaneously upon publication. As a result, to provide the figures requested would have breached The Code of Practice for Statistics, The Pre-release Access to Official Statistics Order 2008, and by extension Statistics and Registration Service Act 2007.

Should a decision notice rule in favour of disclosure, then any requester wishing to obtain advanced sight of unpublished figures would be able to use the FOIA to request and obtain a statistic in advance of publication, as long as the request is broken down in a way that is not due to be published. This would clearly be contrary to the intention of the provisions of section T3

of The Code, as well as the specific wording around an "indication of the statistics".

This is supported by the First-Tier Tribunal Appeal Number: EA/2021/01191. In their conclusion the Tribunal agrees with the submission of the MOJ (para 68) which states "The clear purpose of this regime to establish a strict/rigorous regime by which pre-release access to statistics in their final form is controlled. However, as explained below, the Code of Practice also carefully regulates the release of statistics, which are not in their final form. This is equally important since – if this were not done – the very strict rules around pre-release access would be circumvented. Moreover, the policy structures on the release of statistics which are not in their final form – must be seen against the need to ensure the effectiveness of this very strict regime created by Parliament governing pre-release disclosure of national statistics."

As stated in paragraphs 8 to 16 of DIT's response dated 6 May 2022, the relevant prohibition to disclosure is set out in section 13 of the Statistics and Registration Service Act 2007.

The enactment (the Statistics and Registration Service Act 2007 (SRS)) does contain a provision to release official statistics prior (pre-release) to their designation (under section 12 SRS) and publication as Official Statistics.

The provision is found in section 11(2) SRS which provides that "[t]he appropriate authority may for the purposes of the Code by order provide for rules and principles relating to the granting of pre-release access to official statistics." Section 11(8) SRS states that "pre-release access", in relation to official statistics, means access to the statistics in their final form prior to publication.

The following orders have been made under section 11(2) SRS:

- Pre-release Access to Official Statistics (Scotland) Order 2008/399 (Scottish SI)
- Pre-release Access to Official Statistics (Wales) Order 2009/2818
- Pre-release Access to Official Statistics Order (Northern Ireland) 2009/71
- Pre-release Access to Official Statistics Order 2008/2998

Examples of scenarios where pre-release is provided for in the orders listed above include:

- pre-release under schedule 1 para 13 of the 2008/2998 Order where statistics may be released for the UK to comply with its international obligations to provide data to international statistical organisations;
- pre-release under schedule 1 para 12 of the 2008/2998 Order if, in the opinion of the person responsible, such access is needed for the effective discharge by the Bank of England of its functions.

In the Orders listed above, no provision is made for the pre-release of official statistics to the public at large such that statistics could be obtained by way of a FOIA request.'

33. In response to the Commissioner's queries, DIT provided further detail about the classification of statistics as follows:

"The following definitions are taken from the Code of Practice for Statistics (see <https://code.statisticsauthority.gov.uk/the-code/>):

Official statistics – Statistics produced by crown bodies, those acting on behalf of crown bodies, or those specified in statutory orders, as defined in section 6 of the Statistics and Registration Service Act 2007.

National Statistics – Official statistics assessed as fully compliant with the Code are given National Statistics status by the Office for Statistics Regulation, in line with the Statistics and Registration Service Act 2007."

34. In further correspondence with the Commissioner, DIT also stated;

"Official statistics are an essential public asset. They provide a window on society, the economy and on the work and performance of government. They are fundamental to the judgements and decisions made by the public, by government and by an enormous range of other organisations. As per T2.1 of the Code of Practice for Statistics, the Chief Statistician/Head of Profession for Statistics should have sole authority for deciding on methods, standards and procedures, and on the content and timing of the release of regular and ad hoc official statistics. This should include: determining the need for new official statistics, ceasing the release of official statistics, and the development of experimental statistics.

The strategic export controls licensing statistics publication was deemed to be an official statistics publication in July 2015 and has since been produced in line with the Code of Practice for Statistics. As the publication has not been formally assessed by the Office for Statistics Regulation, it does not currently have National Statistics status."

35. DIT provided details of how release of export control licensing figures would provide an "indication" of the statistics prior to their official publication. The Commissioner is not able to reproduce that example here as it contains actual figures. DIT explained that a number of the companies' names (to whom licenses were granted) are in the public domain and would be well known to an informed individual or individuals. It argued that:

"It shows that a small number of FOI requests that focus on a specific country with known companies would provide an ever-increasing indication of the final published statistics. The Code of Practice for Statistics states that no indication of the statistics should be made public, irrespective of how minor an indication is given (e.g., even confirming whether a statistic was non zero), this would still be in breach of the Code."

36. Whilst acknowledging that the specific information requested by the complainant will not form part of the published statistics, the Commissioner is satisfied by DIT's explanation which sets out that the requested information constitutes a component part of the figures included within the strategic export controls licensing statistics. These statistics are an official statistics publication produced in accordance with the Code of Practice for Statistics. The Commissioner accepts that the specific information requested would require the provision of figures which are a subset of, and therefore a component part of, the figures included within this publication. He is satisfied that the release of these would give a direct indication of figures intended for publication prior to their release.

Conclusion

37. The Commissioner is satisfied that the remaining requested information for parts 1-4 of the request in this case was subject to a statutory prohibition on disclosure, provided in the Statistics and Registration Services (SRS) Act 2007 and the listed Pre-release Access to Official Statistics Orders (see quoted section under paragraph 31). Therefore, it is exempt from disclosure under FOIA by virtue of the absolute exemption at section 44.

38. As the Commissioner has found section 44(1)(a) to be engaged in respect of the withheld information in parts 1-4 of the request, he has not deemed it necessary to consider DIT's reliance on sections 22 and 36 of FOIA.
39. The Commissioner will next consider DIT's approach to part 5 of the request, for which it cited both sections 41 and 43 of FOIA. The Commissioner has first examined DIT's reliance on section 41.

Part 5 of request – section 41 – information provided in confidence

40. Section 41(1) of FOIA states that:

“Information is exempt information if –

- a) it was obtained by the public authority from any other person (including another public authority), and
- b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

41. In other words, section 41(1) applies to information provided to DIT, disclosure of which would constitute a breach of confidence over which a person could take legal action.
42. The information concerned must have the necessary 'quality of confidence' in that the information is not trivial nor is it readily available by other means, it must possess the 'obligation of confidence' in that the provider must have an explicit or implicit expectation that the information would not be shared, and release of the information would have to cause detriment to the confider. If the information concerned meets these criteria, it can only be disclosed by consent, if required by law or if there is an overriding public interest in disclosure

Was the information obtained from another person?

43. The requested information relates to export licence applications which are submitted by companies to DIT as the responsible public authority. The complainant has specified the company EDO MBM Technology Ltd in his request. The Commissioner is satisfied that the information was obtained from another person.

Would disclosure constitute an actionable breach of confidence?

44. 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?

45. 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.

46. DIT has advised that the information is confidential as it is derived from confidential contracts that EDO MBM Technologies have entered with their customers. It explained that the confidential sensitive commercial information falling within scope of this request is the End User related to export licence applications from EDO MBM technologies in respect of the proposed export of Military rated equipment overseas.

47. 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?

48. 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”.

49. 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".'

50. DIT also provided the following information:

'EDO MBM Technology Limited has stated the following to DIT "...we enter into Non-Disclosure Agreements with all of our customers, and any information provided to us by them is regarded as confidential and should not be released into the public domain. The information is commercially sensitive both for EDO MBM and for the customer. We are legally bound by these agreements".'

51. 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 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 FOIA will necessarily or automatically be disclosed in response to a request.

Would disclosure be of detriment to the confider?

52. DIT submitted that:

"...release of this information would harm the commercial interests of EDO MBM Technology Limited, the UK Exporter, and the Consignee/End Users. 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".

53. Although DIT did not elaborate on its 'mosaic effect' argument referenced above, the Commissioner has referred to a previously issued

decision notice⁸ regarding DIT and the subject of export licences where this is explained.

54. The Commissioner does not intend to reproduce those detailed arguments here but would explain the 'mosaic effect' as referring 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 or a motivated individual.
55. Having considered all submissions before him, the Commissioner accepts 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 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?

56. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). British courts have historically recognised the importance of maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.
57. 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 DIT could successfully rely on such a public interest defence to an action for breach of confidence in this case.
58. In submissions to the Commissioner, the complainant stated:

⁸ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2553794/fs50692923.pdf>

"According to common law there is no breach of confidence in the disclosure or iniquity. If the information withheld in part five of the request under section 41 discloses that either EDO MBM Technology Ltd was intending to export Hornet bomb racks for use on Bayraktar TB2 drones or othr [sic] UAV, or did not disclose this end-use when it is clearly the end-use, there would clearly be an iniquity disclosed in either case that would override any duty of confidence that might exist.

Even if no iniquity is disclosed, in all the circumstances of the case the public interest favours transparency in order to inform the public debate. The company have already waived the expectation of confidence by giving public statements to the press that they are supplying Hornet bomb racks to the Bayraktar TB2, and the Karayel. Further evidence published in national press since 2019 has confirmed this fact."

59. The complainant said he had spent the past four years researching the links between EDO MBM Technology Ltd and the development of the Turkish armed drone programme as part of a wider research project into the assistance by EDO MBM Technology Ltd in the commission of potential violations of human rights and international humanitarian law by several governments around the world, including the UK government and that of the United States.

60. The complainant also said:

"In November 2019 The Guardian published a significant investigative report based on their verification of a dossier of evidence I had shared with them showing how, despite Turkish government claims to the contrary, the weapons release system that enabled the development of Turkey's first armed drone was provided by a UK subsidiary of the US arms corporation L3Harris, namely EDO MBM Technology Ltd based in Brighton.

This company has since January 2022 been renamed, L3Harris Release and Integrated Systems Ltd, but in these submissions I will use the name they had at the time of the FOIA request in 2021."

61. He also stated that the evidence he has uncovered:

"...strongly suggests that EDO MBM Technology Ltd did not comply with its legal obligations to disclose the end-use of its military equipment, technology and component parts, exported to Turkey over several years 2014-2021. As stated above I have

reported this evidence to the national press, but I have also tried to report this information to HM Customs enforcement at HMRC [Her Majesty's Revenue and Customs].

I had no confirmation that any investigation was carried out by HMRC as they refused to confirm it. Unlike the USA, where corporate violations of arms export laws are made public and companies found in violation are named and shamed, no similar level of transparency or accountability exists in the UK system. The UK regularly claims to have the most "robust" arms export control regime in the world but does not see the need to confirm this claim with any real openness about the extent to which it holds arms companies to account for their wrong doings. Where violations are found to have been committed, secret settlements are reached between non-compliant companies and HMRC. Companies are not named by investigating authorities even after they have admitted violations, so it is impossible for members of the public to scrutinise the severity or laxity of legal penalties imposed on these companies.

In light of the grave consequence of illegal arms exports and proliferation of armed drones within conflict zones and military forces engaged in potential violations of human rights and International Humanitarian law, this is a major flaw in the UK export control regime. In this specific case there is evidence that the Hornet bomb rack has been used by TurkeyHto [sic] develop and regularly supply its armed drones that have been used in violation of International Humanitarian Law and in breach of international obligations by Turkey in northern Syria and Iraqi Kurdistan. There is also evidence of re-transfer to Libya in direct violation of an UN arms embargo according to UN investigators, as well as to Azerbaijan in contravention of an OSCE [the Organisation and Co-operation in Europe] for Security and embargo. According to photographic evidence of downed Bayraktar TB2 drones in Nagorno-Karabakh, the bomb rack being used on the UAV in that conflict had an identical design to that of the Hornet bomb rack patented by EDO MBM technology Ltd.

Most recently, Bayraktar TB2 drones have been supplied by Turkey to Ukraine in the midst of a bloody internal armed conflict, and in a direct provocation of Russian security interests that some argue contributed to the collapse of diplomacy surrounding the Minsk agreement that has led to the catastrophic war that has killed many thousands and displaced millions or civilians. The apparent fact that none of the licence applications made by EDO MBM Technology Ltd to export Hornet bomb racks

list the end-user as Libya or Ukraine, shows how flawed the UK export controls are and adds further weight to the public interest in the disclosure of the withheld information. In the end it is the UK government that carry the responsibility for permitting the proliferation of these warmongering technologies around the world and the UK government must be held accountable for its failure, deliberately or by neglect, to control the spread of deadly weapons. This accountability can only be achieved with transparency and full disclosure of its export licence records in this case”.

62. DIT recognised the following in favour of disclosure of the remaining requested information:

“There is a public interest in informed debate regarding the licensing and export of controlled goods.”

63. However, DIT also raised the following concerns:

“There is a strong 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.

Release of this information would undermine the export licensing process which would be likely to cause detriment to the Department. 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 in relation to its ability to assess licence applications effectively, and to the exporter and their overseas customers 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.

We do not consider that there is an overriding public interest that would cause DIT to set aside its obligation of confidence to EDO MBM Technology Limited.”

64. 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 Ukraine) in contravention of international law and the UK's international, European and domestic obligations.

65. 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 issues surrounding the subject matter of his request have been reflected in The Guardian article.
66. 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.
67. 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.
68. The Commissioner considers 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 DIT. 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. 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.
69. 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 DIT 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 [Her Majesty's Government] publishes relating to export licensing.

70. 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. The Commissioner acknowledges and appreciates the complainant's position and vested interest in securing the withheld information. 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.
71. 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.
72. 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.

Conclusion

73. The Commissioner has considered all the circumstances of this case and the nature of the information being withheld under section 41(1). He has concluded that there is stronger public interest in maintaining the obligation of confidence than in disclosing the information. Therefore, the Commissioner finds that the condition under section 41(1)(b) is also met and that DIT is entitled to withhold the requested information in part 5 of the request under section 41(1) of FOIA.
74. Given that the Commissioner has found that section 41 is engaged, he has not gone on to consider the application of section 43. However, he considers it likely that section 43 would be engaged in this case.

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: 0203 936 8963

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

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