

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 November 2022

Public Authority: Department for International Trade
Address: Old Admiralty Building
London
SW1A 2DY

Decision (including any steps ordered)

1. The complainant made a multi-part request to the Department for International Trade (DfIT) for numbers of export licence applications between two named companies for specific goods. The DfIT provided answers to the first parts of the request but refused to provide the numbers for parts 7-10 of the request under both section 43 and 41 of the FOIA.
2. The Commissioner's decision is that the public authority has failed to demonstrate either exemption is engaged and therefore is not entitled to rely on either exemption to withhold the information at parts 7 – 10 of the request.
3. The Commissioner requires the DfIT to take the following steps to ensure compliance with the legislation:
 - Disclose to the complainant the information requested at parts 7-10 (inclusive) of the request.

Request and response

4. On 18 January 2022 the complainant wrote to the Department for International Trade (DfIT) and asked for information relating to the following statement:

"Having considered the factual position and the information available, the government is now satisfied that decisions on all licence

applications to Turkey can be taken following a careful assessment against the Strategic Export Licensing Criteria on a case-by-case basis. All existing and new export and trade licence applications for Turkey will now be assessed on a case-by-case basis against the Strategic Export Licensing Criteria.

The Export Control Joint Unit (ECJU) is working with advisory government departments to clear through the backlog of existing applications as quickly as possible. "

5. Following this, the complainant made a multi-part request for numbers only. The DfIT provided information for part 1-6 of the request but refused to provide the information for parts 7-10 on the basis of both section 43 and 41 of the FOIA. The outstanding parts of the request were as follows:

"7 The NUMBERS of export licence applications to Turkey in the backlog as of 13 December 2021 that have been made by EDO MBM Technology Ltd, Brighton to export ML4b1 items and further described as:

7.a. HORNET bomb rack or rocket launcher, (equipment or components)

7.b. WASP bomb rack or rocket launcher, (equipment or components)

7.c. SCORPION bomb rack or rocket launcher, (equipment or components)

8. The NUMBERS of export licence applications to Turkey in the backlog as of present time that have been made by EDO MBM Technology Ltd, Brighton to export ML4b1 items and further described as:

8.a. HORNET bomb rack or rocket launcher, (equipment or components)

8.b. WASP bomb rack or rocket launcher, (equipment or components)

8.c. SCORPION bomb rack or rocket launcher, (equipment or components)

9. The NUMBERS of export licence applications to Turkey in the backlog as of 13 December 2021 that have been made by EDO MBM Technology Ltd, Brighton to export ML4b1 items to the Turkish company ROKETSAN described as:

9.a. HORNET bomb rack or rocket launcher equipment, (equipment or components)

9.b. WASP bomb rack or rocket launcher, (equipment or components)

9.c. SCORPION bomb rack or rocket launcher, (equipment or components)

10. The NUMBERS of export licence applications to Turkey in the backlog as of present time that have been made by EDO MBM Technology Ltd, Brighton to export ML4b1 items to the Turkish

company ROKETSAN described as:

10.a. HORNET bomb rack or rocket launcher equipment, (equipment or components)

10.b. WASP bomb rack or rocket launcher, (equipment or components)

10.c. SCORPION bomb rack or rocket launcher, (equipment or components)“

6. The public authority upheld its position at internal review.

Scope of the case

7. The Commissioner considers the scope of the investigation to be to determine whether the DfIT has correctly applied the section 43(2) or 41 exemptions to refuse to provide the number of applications for each part of the request.

Reasons for decision

Section 43 – prejudice to commercial interests

8. Section 43(2) FOIA exempts information the disclosure of which would, or would be likely to, prejudice the commercial interests of any person (ie an individual, a company, the public authority itself or any other legal entity). In order for such information to be exempt, a public authority must show that, because it is commercially sensitive, disclosure of it would, or would be likely to, prejudice the person's commercial interest. The exemption is qualified, so where the exemption is engaged it is then necessary to apply a public interest balancing test.
9. The Commissioner firstly notes that in a previous case [IC-109528-K3H7](#) the DfIT had responded to a multi-part request and the first part of this was as follows:
- “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“
10. In this case the DfIT provided the number of applications made in relation to Turkey. This request went further and also asked for dates of each application and information showing how many of the applications were granted, refused or withdrawn.
11. There are differences between these requests – in this case the request asks for a breakdown of numbers by type of device rather than asking for an overall number for all devices. This request also specifies not only

the UK based company making the application but the Turkish based company receiving the exported devices.

12. The DfIT has argued that section 43 applies because disclosing the number of export licence applications submitted by a named UK company to a named end-user, linked to information derived from the export licence applications (type of goods, end-use destination) would be likely to prejudice the commercial interests of the company who was granted the licence ie EDO MBM Technology.
13. It is not sufficient for a public authority to simply assert that prejudice would occur. It must identify the prejudice and explain how the prejudice would arise from disclosure. Where this prejudice relates to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.
14. In this case the DfIT argued that export licence applications and the documents associated with them contain commercially sensitive information about proposed exports such as details of end-users, value of exports and type of goods. This information could be of use to competitors. The DfIT argued that disclosure of the name of the company alongside this information would reveal specific sensitive information derived from commercial contracts that would be likely to damage the trading relationship between the UK company and their customer(s). It further suggests that this could risk future trading opportunities with that customer and other potential customers who may be concerned their information might be disclosed under the FOIA if they trade with the UK company.
15. The Commissioner considers these arguments to be quite speculative, it is not clear the DfIT has engaged with EDO MBM to gather its views on disclosure but, even if it has, the arguments do not appear to be relevant to the information that has been requested in this case. The DfIT has, by applying the exemption, confirmed it holds information within the scope of the request. It is not clear to the Commissioner how, at this stage, providing the numbers for each application would be commercially damaging to EDO MBM beyond any commercial prejudice that may already have occurred by confirming the information is held and being able to combine this with information already in the public domain about applications.
16. The DfIT's arguments are that export licence applications and the documents associated with them contain commercially sensitive

information about proposed exports such as details of end-users, value of exports and type of goods. The Commissioner accepts this may well be true but the request is not asking for details of applications or any associated documents but is simply asking the DfIT to provide the number of applications made by EDO MBM to a named end-user for the export of various different goods.

17. Based on the above, the Commissioner does not consider the DfIT has demonstrated there is a causal link between the information requested (the numbers of applications) and the prejudice to EDO MBM's commercial interests as argued by the DfIT. As such the Commissioner considers the section 43(2) exemption is not engaged. He has therefore now gone on to consider the section 41 exemption.

Section 41 – information provided in confidence

18. Section 41 states that information is exempt from disclosure if it was obtained by the public authority from another person and if the disclosure of the information would constitute a breach of confidence actionable by that or any other person.
19. The Commissioner is satisfied the information was obtained by 'another person'; in this case EDO MBM.
20. When assessing whether a disclosure would constitute a breach of confidence there are three elements to consider:
 - the information must have the necessary quality of confidence
 - it must have been imparted in circumstances importing an obligation of confidence, and
 - there must have been an unauthorised use of the information to the detriment of the confider.
21. The DfIT stated in its refusal notice that:

"We consider that the relevant information does have the necessary quality of confidence and therefore, that disclosure of this information would result in an actionable breach of confidence. Moreover, we believe there is a strong public interest in protecting that confidence and there are no public interest considerations in relation to this information requiring us to set the duty of confidentiality aside."
22. In the internal review the DfIT went further and stated:

"The information withheld is used to make an assessment on applications for licensing and determining the outcomes of the applications. It is provided to the Export Control Joint Unit with the

implicit understanding and trust that it will be treated confidentially. The provision of this information is a legal requirement of the export licence application process. As part of this process applicants are informed that this information will only be processed in accordance with the requirements of processing the licence applications. Therefore there exists an expectation from the providers that this information would not be released to the public without their consent.

Additionally, the sources of this information are not ones readily available to the public. Disclosure of the information would jeopardise the relationship between the UK/government and companies/organisations of information providers.”

23. The Commissioner is satisfied the information has the necessary quality of confidence in that it is not already publicly available and is not trivial.
24. Any information provided to the DfIT as part of the export licence application process appears to be provided in circumstances importing an obligation of confidence as the DfIT informs applicants the information will only be processed in accordance with the requirements of processing the licence application. It is not clear how explicit this obligation of confidence is and regardless of this it does not prevent the information from still being subject to disclosure under the FOIA in the correct circumstances.
25. The final test for the Commissioner to consider is whether the disclosure would be to the detriment of the confider. The DfIT argues EDO MBM would be adversely affected in its relationships with the DfIT and other companies. The Commissioner is not minded to accept this argument; as has already been argued in this notice the Commissioner does not accept that disclosing the number of applications would have any commercial prejudice on EDO MBM so it stands to reason there would also be no commercial detriment that could be claimed under this part of the test. Besides commercial detriment, it would be difficult to argue there would be any personal detriment or detriment to the relationship between EDO MBM and the DfIT as there are legal requirements for EDO MBM to provide information to the DfIT if it wishes to apply for applications in the future.
26. On this basis the Commissioner finds that the DfIT has failed to demonstrate that disclosing the specific information requested in this case would constitute a breach of confidence actionable by EDO MBM.
27. As such the Commissioner finds the DfT has incorrectly refused to provide the information under section 41 or 43 of the FOIA and the DfIT should now disclose the information previously withheld.

Right of appeal

28. 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

29. 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.

30. 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

Jill Hulley
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Wycliffe House
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