

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 21 February 2023

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

Decision (including any steps ordered)

1. The complainant requested information relating to two meetings between Lord Grimstone, Minister of State and L3Harris. The Department for Business and Trade (at the time of the request the Department for International Trade) disclosed some information and refused to disclose the remainder, citing sections 24(1) (national security), 27(1)(a) (international relations), 29(1) (the economy), 35(1)(a) (government policy), 40(2) (personal data), 41(1) (information provided in confidence), and 43(2) (commercial interests).
2. The Commissioner's decision is that the Department was entitled to rely on the exemptions at sections 24(1), 35(1)(a), 40(2) and 43(2) in respect of the withheld information. No steps are required.

Request and response

3. The complainant requested the following information from the Department on 4 June 2021:

Please provide minutes and any related correspondence, notes, emails for the following two DIT [the then Department for International Trade] meetings.

1. Meeting between The Lord Grimstone of Boscobel, Minister of State and L3Harris on 11/6/2020
2. Meeting between The Lord Grimstone of Boscobel, Minister of State and L3Harris on 18/5/2020

4. The Department responded on 26 July 2021. It disclosed some information in full, and some information with redactions. It withheld the remainder of the information it held, citing the exemptions at sections 40(2), 27(1)(a) and 43(2) of FOIA.
5. The complainant requested an internal review on 27 July 2021. The Department provided him with the outcome of that review on 20 August 2021. The Department advised that it had identified further information relevant to the request. It maintained its reliance on the exemptions cited, and also sought to rely on sections 41(1) and 29 of FOIA.
6. On 20 August 2021 the complainant wrote to the Commissioner to complain about the Department's response to his request.
7. During the course of the Commissioner's investigation the Department reconsidered the request twice and disclosed some of the withheld information. It issued revised responses to the complainant on 10 November 2022 and 3 February 2023. At this point the Department also sought to rely on the exemptions at section 24(1) and section 35(1)(a) of FOIA.

Scope of the case

8. On 4 February 2023 the complainant wrote to the Commissioner to confirm that he remained dissatisfied with the Department's response to his request. He asserted that the requested information ought to have been disclosed, providing detailed public interest submissions in support of his complaint. The Commissioner has considered these arguments in the context of the specific information withheld under each exemption claimed.
9. The complainant pointed out that L3Harris is part of the Lockheed Martin F-35 production consortium headed by BAE Systems in the UK, and is also part of the UK Raytheon Paveway IV production team. He argued that there is an ongoing public debate in the UK about the lawfulness of UK arms exports to countries that may use them in contravention of international humanitarian law.
10. The complainant also stated that it was in the public domain that the UK government "lost over one billion pounds in investment" that it had made in the EU Galileo GNSS [Global Navigation Satellite Systems] project from which it was excluded after Brexit. He added that £92million had been spent researching the viability of a new UK sovereign GNSS system to replace it, that had not solved the problem.

11. Finally, the complainant argued that UK Government discussions with US contractors such as L3Harris amounted to negotiations with US interests to secure UK public services and national security. He argued that there were questions as to what L3Harris proposed or offered, and how far the proposals placed UK critical infrastructure under the "dependent wing of US technologies and corporate influence".
12. The complainant argued that there was a particularly weighty public interest in the disclosure of information that may inform the public, and the debate.
13. The Commissioner notes that the Department has advised the complainant that the withheld information does not relate to the subject matter or specific public interest arguments the complainant had set out. The Department has clarified that the information in question fell "within the remit of expanding on the investment opportunities within UK and bolstering the UK economy".

Reasons for decision

Section 24(1): national security

14. The Department argued that one small part of the withheld information was exempt from disclosure on the basis of section 24(1) of FOIA. This states that:

"Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security".

15. FOIA does not define the term 'national security'. However, in *Norman Baker v the Information Commissioner and the Cabinet Office*¹ the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman*,² concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:

¹ EA/2006/0045

² [2001] UKHL 47

- 'national security' means the security of the United Kingdom and its people;
 - the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
 - the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
 - action against a foreign state may be capable indirectly of affecting the security of the UK; and,
 - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
16. Furthermore, in this context the Commissioner interprets 'required for the purpose of' to mean 'reasonably necessary'. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate.
 17. The Commissioner has examined the specific information to which section 24 has been applied. He cannot describe it in detail since to do so would defeat the purpose of the exemption. However the Commissioner accepts that exemption from disclosure is required for the purpose of safeguarding national security.
 18. Section 24(1) provides a qualified exemption, so the information in question must still be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
 19. The Commissioner has considered the complainant's public interest arguments set out above, insofar as they relate to the specific information withheld under section 24(1).
 20. The Department also acknowledged the general public interest in disclosing information. It further acknowledged that openness may increase public trust in and engagement with the government.
 21. The Department argued that there was a strong public interest in maintaining the exemption at section 24(1). Again, the Commissioner cannot provide details of the Department's arguments without disclosing the content of the information in question.

22. The Commissioner recognises that he, unlike the complainant, has had the benefit of examining the information withheld under section 24(1). The Commissioner is of the opinion that disclosure of this specific information would not demonstrably inform the public, nor would it assist the public's understanding of the Department's interaction with L3Harris. He accepts that, given the content of the information, disclosure would be more likely than not to undermine national security.
23. Therefore the Commissioner finds that the public interest in maintaining the exemption at section 24(1) outweighs the public interest in disclosure of the information.

Section 35(1)(a): formulation or development of government policy

24. The Department argued that two extracts of the withheld information were exempt from disclosure on the basis of section 35(1)(a) of FOIA. This provides that information held by a government department is exempt if it relates to the formulation or development of government policy.
25. The Department explained that the information in question comprised lines to take on the UK government's position on policy areas in the context of the UK's exit from the European Union. It had been prepared as part of a broad range of briefing topics for the Minister in advance of meeting L3Harris.
26. Having inspected the information the Commissioner is satisfied that section 35(1)(a) is engaged, and has gone on to consider the public interest test.

Public interest in favour of disclosure

27. As with the information withheld under section 24(1), the Department identified a general public interest in disclosing information. It accepted that disclosure could assist towards public debate and scrutiny, which could increase public trust and confidence.
28. The Commissioner has considered the complainant's public interest arguments as summarised above, but again concludes that they do not relate to the specific information withheld under section 35(1)(a).

Public interest in favour of maintaining the exemption

29. The Department set out that the information withheld under section 35(1)(a) related to policy matters that remained live at the time of the request. It argued that the public interest lay in protecting the safe space necessary to discuss and assess policy options.

Balance of the public interest

30. The Commissioner has had regard to his published guidance on section 35,³ which points out that as a class-based exemption section 35 carries no inherent weight in favour of maintaining the exemption. The relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case.
31. Taking into account all the circumstances of this case, including the extent and content of the withheld information itself, the Commissioner finds that the public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in the disclosure of this information. Therefore the Department was entitled to refuse to disclose this information.

Section 40(2): third party personal data

32. Section 40(2) of 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.
33. In this case the relevant condition is contained in section 40(3A)(a).⁴ 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 UK General Data Protection Regulation (the UK GDPR).
34. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (the DPA). If it is not personal data, then section 40 of FOIA cannot apply.
35. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

³ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

⁴ As amended by Schedule 19 Paragraph 58(3) of the DPA.

36. In this case the Department cited section 40(2) in respect of the names and contact details of a number of individuals, including civil servants and external parties. The Department's position is that disclosure of this information into the public domain would be unfair and unlawful, which would contravene principle (a) as set out in the DPA.
37. The Commissioner is satisfied that the information in question is personal data of individuals other than the requester. This is because the individuals could be identified from their names and contact information. The Commissioner has therefore gone on to consider whether disclosure of this information into the public domain would contravene any of the data protection principles.
38. The most relevant DP principle in this case is principle (a). Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
39. 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.
40. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing, ie disclosure of the personal data into the public domain. It must also be generally lawful.

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

41. Article 6(1) of the UK 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.
42. The Commissioner considers that the lawful basis most applicable is Article 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.

43. Accordingly, in considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
44. The Commissioner further considers that these tests should be considered in sequential order, ie if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

Legitimate interests

45. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests.
46. 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

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) of 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 UKGDPR would be contravened by the disclosure of information, Article 6(1) of the UKGDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

47. The Commissioner is of the opinion that there is a legitimate interest in the public being informed about the Department's dealings with companies outside the UK. Therefore the Commissioner finds that there is a legitimate interest in the Department publishing information about meetings with L3Harris.

Is disclosure necessary?

48. Having identified a legitimate interest, the next step is to consider whether disclosure of the personal data in question is actually necessary to meet that legitimate interest 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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
49. The Commissioner recognises that the Department has disclosed a substantial proportion of the requested information. The withheld personal data, ie names and job titles would not enhance or practically assist the public's understanding of the meetings with L3Harris. Consequently the Commissioner is not persuaded that it is necessary for the Department to disclose the withheld personal data in this case.
50. The Commissioner finds that the necessity test is not met, therefore the Department would not be able to rely on Article 6(1)(f) as a lawful basis for processing the personal data in question. It follows that disclosure of this information would not be lawful, and would contravene principle (a).
51. For this reason the Commissioner finds that the Department was entitled to rely on the exemption at section 40(2) of FOIA in respect of the withheld personal data.

Section 43(2): commercial interests

52. Section 43(2) of FOIA provides that information is exempt where disclosure "would, or would be likely, to prejudice the commercial interests of any person (including the public authority holding it)".
53. In order for a prejudice based exemption such as section 43(2) 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 were 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 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, i.e. 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 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.
54. The Department relied on the exemption at section 43(2) in respect of the bulk of the withheld information, on the basis that disclosure would be likely to prejudice its own commercial interests, and would prejudice those of L3Harris.
55. In respect of the Department's commercial interests, the Department set out that disclosure of the information in question would have an adverse impact on its ability to obtain relevant and accurate information from international organisations and customers about their specific expectations. This would in turn adversely affect the Department's relationships with such third parties. The Department highlighted the importance of securing full and uninhibited engagement of international organisations and customers, who must feel confident that they could share sensitive information as part of engagement with the Department.
56. The Department also set out that disclosure of the withheld information could allow other investors in global aerospace and defence technology to speculate as to the UK Government's requirements, thus artificially raising costs.
57. In respect of L3 Harris's commercial interests, the Department set out that the withheld information contained detailed information about L3Harris which would give competitors a commercial advantage when competing to agree and secure investment opportunities. The information could be used as a reference point against which competitors might establish patterns and gain insight.
58. The Department confirmed that it had consulted L3Harris, who expressed the view that disclosure of the information in question would be detrimental to its commercial interests. Disclosure of information relating to the nature of investment opportunities would be

commercially damaging, impact investment risk of existing business, and put competitors at an advantage.

59. The Commissioner accepts that the prejudice identified by the Department in this case does relate to the applicable interests within section 43(2), ie commercial interests. The first criterion is therefore met.
60. In terms of the second criterion, the Commissioner has considered the Department's arguments relating to its own commercial interests. He acknowledges the importance of building relationships based on full engagement with international organisations and customers. He accepts that disclosure of the information withheld under section 43(2) would be likely to prejudice the Department's commercial interests by encouraging investor speculation and artificially inflated costs.
61. The Commissioner further accepts that disclosure of the withheld information into the public domain would be likely to have the causal effect of causing prejudice to the commercial interests of L3Harris, given the nature and content of the information in question.
62. The Commissioner therefore finds that the exemption at section 43(2) was correctly engaged by the Department. Section 43(2) provides a qualified exemption; therefore the Commissioner must decide whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing withheld information.

Public interest in favour of disclosure

63. The Department reiterated the general public interest in disclosing information. It accepted that disclosure could assist towards public debate and scrutiny, which could increase public trust and confidence.
64. The complainant's general public interest arguments are set out at paragraphs 9-11 above, and the Commissioner has considered them insofar as they relate to the information withheld under section 43(2).

Public interest in favour of maintaining the exemption

65. The Department referenced its arguments relating to the prejudice to L3Harris's commercial interests that it anticipated would be likely should the information be disclosed. The Department emphasised that it would not be in the public interest to disclose information that would be likely to have such an adverse impact, especially given that L3Harris had a reasonable expectation of confidentiality. The Department considered

that the public interest lay squarely in respecting confidentiality and thus protecting the relationship built with parties such as L3Harris.

66. The Department also set out that the public interest lay in preserving its own commercial position by securing full and uninhibited engagement of global companies in negotiations. This was necessary to ensure robust competition and value for money.

Balance of the public interest

67. The Commissioner considers that there is a strong public interest in informing the public about the way the Department engages with external organisations and companies. He notes that the Department has disclosed a significant portion of the requested information, both in response to the request and following the Commissioner's intervention. This includes material produced as briefing notes for both meetings.
68. The Commissioner acknowledges the complainant's public interest arguments set out above. However, the Commissioner is of the opinion that disclosure of the specific withheld information in this case, ie information relating to two meetings held in May and June 2020, would not be of practical assistance in informing that debate.
69. The Commissioner is however mindful that the remaining information withheld under section 43(2) is considered sensitive by the Department and by L3Harris. The Department has demonstrated that disclosure would be likely to prejudice the commercial interests of both parties. The Commissioner considers that the risk of prejudice, and the consequences of disclosure, outweigh the potential benefits to the public.
70. On balance, therefore, the Commissioner finds that the public interest favours maintaining the exemption at section 43(2) in respect of the withheld information.

Other exemptions claimed

71. As set out above the Commissioner has found that the Department was entitled to rely on the exemptions at sections 24(1), 40(2), 35(1)(a) and 43(2) in respect of the withheld information. In light of this the Commissioner is not required to consider the Department's reliance on the other exemptions claimed, namely sections 27(1)(a), 29(1) and 41(1) of FOIA.

Procedural requirements

Section 1: general right of access

Section 10(1): time for compliance

72. Section 1(1)(a) of FOIA requires a public authority to inform the complainant in writing whether or not recorded information is held that is relevant to the request. Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the complainant unless a valid refusal notice has been issued.
73. Section 10(1) requires that the public authority comply with section 1 promptly, and in any event no later than 20 working days after the date of receipt of the request.
74. In this case the complainant submitted his request on 4 June 2021, but the Department did not issue a substantive response until 26 July 2021. Therefore the Commissioner finds that the Department failed to comply with section 1(1)(a), section 1(1)(b) and section 10(1) in this regard.
75. In addition, the Department disclosed information to the complainant well outside the 20 day time for compliance, including during the Commissioner's investigation. The Commissioner commends the Department for reconsidering the request, but it follows that the Department failed to comply with sections 1(1)(b) and 10(1) in respect of this information.

Section 17: refusal notice

76. Section 17(1) of FOIA states that a public authority wishing to refuse any part of a request must issue a refusal notice within the 20 day time for compliance. The refusal notice must cite any exemption relied on, and state why the exemption applies.
77. Since the Department claimed a late reliance on the exemptions at sections 24(1), 29(1), 35(1)(a) and 41(1), it follows that the Department did not cite these exemptions in its refusal notice. The Commissioner therefore records that the Department failed to comply with section 17(1)(b) and (c) in respect of these exemptions.

Right of appeal

78. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

79. 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.
80. 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

**Sarah O’Cathain
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