

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2023

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for International Trade (DIT)¹ seeking the dates, minutes and briefings of the UK-Israel Trade Working Group for the period 2017 to September 2021. DIT provided redacted copies of the information requested. It explained that the redacted information was exempt from disclosure on the basis of the following sections of FOIA: 27(1)(a), (c), (d) and 27(2) (international relations), 35(1)(a) (formulation or development of government policy) and 40(2) (personal data).
 2. The Commissioner's decision is that the redacted information is exempt from disclosure on the basis of sections 27(1)(a), (c), (d) and 35(1)(a). However, he has concluded that DIT breached section 17(3) of FOIA by failing to conclude its public interest test considerations, and provide the complainant with a substantive response to his request, within a reasonable timeframe.
 3. No steps are required.
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¹ Although this request was submitted to DIT, in February 2023 DIT was replaced with a new government department, namely the Department for Business & Trade (DBT). This decision is therefore served on DBT albeit that the decision notice refers to DIT as it was the body that handled the request and with whom the Commissioner corresponded about this complaint.

Request and response

4. The complainant submitted the following request to DIT on 9 September 2021:

'This is a request for information under the Freedom of Information Act 2000

UK-Israel Trade Working Group.

Please provide

1. A dated list of meetings of the UK- Israel Trade Working Group (2017-present)
 2. Minutes of each meeting including full lists of attendees.
 3. Related briefings for each meeting.'
5. DIT contacted him on 7 October 2021 and confirmed that it held information falling within the scope of his request but it considered this to be exempt from disclosure on the basis of section 35(1)(a) (formulation or development of government policy) of FOIA and it needed additional time to consider the balance of the public interest test. DIT issued a similar holding response on 4 November 2021.
6. DIT provided the complainant with a substantive response to his request on 23 March 2022. It confirmed that it held some information falling within the scope of the request which consisted of briefings and readouts from four separate meetings. DIT provided these documents but explained that some information had been redacted on the basis of sections 27(1)(a), (c), (d) and 27(2) (international relations), 35(1)(a) and 40(2) (personal data) of FOIA.
7. The complainant contacted DIT on the same day to challenge the application of sections 27 and 35. He also questioned whether all of the information falling within the scope of his request had been located.
8. DIT informed him of the outcome of the internal review on 19 May 2022. It explained that there were four Trade Working Groups at the time of the request, the last of which concluded in 2018. The information located and disclosed therefore covered the period within which the Trade Working Groups for the UK-Israel trade deal were operating. DIT also explained that the internal review upheld the application of sections 27(1)(a), (c), (d), 27(2) and 35(1)(a) to the redacted information.

Scope of the case

9. The complainant contacted the Commissioner on 11 August 2022 in order to complain about the way his request for information had been handled. More specifically, he challenged DIT's decision to withhold information falling within the scope of his request on the basis of sections 27(1)(a), (c), (d), 27(2) and 35(1)(a) of FOIA.²
10. The complainant was also dissatisfied with the time it took DIT to consider the balance of the public interest test.

Reasons for decision

Section 27 – international relations

11. DIT withheld some of the disputed information on the basis of sections 27(1)(a), (c) and (d) of FOIA. These state that information is exempt if its disclosure would, or would be likely to, prejudice
 - '(a) relations between the United Kingdom and any other State...
 - ...(c) the interests of the United Kingdom abroad, or
 - (d) the promotion or protection by the United Kingdom of its interests abroad'

DIT's position

12. DIT explained that the information withheld on the basis of these exemptions was provided to the UK Government by other countries in the expectation that this information would be treated as confidential. The provision of such information was in preparation for further detailed talks relating to the UK's future trading relationships. DIT argued that whenever two countries enter into such discussions, each country needs to reveal sensitive information relating to international relations, domestic and international politics, social policy and commercial interests in order to allow any kind of progress to be made. Accordingly, DIT argued that there is an expectation from both parties that any information relating to these discussions will be treated as confidential.
13. As a result, DIT argued that disclosure of information withheld on the basis of section 27 would undermine Israel's confidence in the UK's

²² It is relevant to note, for the reasons that will be come apparent later in this notice, that the Commissioner's role is limited to considering the application of exemptions at the point of the request.

ability to protect sensitive information and to engage in a frank exchange of political views with another country. As a result, DIT argued that in its view this loss of confidence is likely to result in countries being unwilling to share sensitive information with the UK. Consequently, it is likely that the release of this information would harm the UK's existing and future diplomatic and trade relationships, and negatively impact the UK's ability to negotiate and conclude future free trade agreements. This includes other countries that the UK is already negotiating with, or those it plans to negotiate with in the future.

14. DIT acknowledged that the information within the scope of the request includes information relating to Free Trade Agreement negotiations from the past. Nevertheless, it explained that this information is still under the scope of the exemptions under the FOIA, as the UK is still in live negotiation on trade matters with Israel.³ DIT noted that the information in the scope includes details of meetings with the Israeli Minister of Economy and officials from both sides on matters which are relevant to the current live negotiation of a revised Free Trade Agreement with Israel.
15. As a result, DIT argued that disclosure of the information withheld under section 27 of FOIA would have a detrimental impact on the UK's negotiating position with Israel in light of the circumstances described above because the UK's ability to engage with Israel in seeking to negotiate a revised Free Trade Agreement would be impeded as a consequence. This is because the disclosure of this information could indicate UK's previous positions on matters under negotiation in the live negotiation of a revised trade deal.
16. DIT emphasised that it had undertaken a thorough review of the material within the scope of the request and disclosed material which it had concluded did not impact on international relations.
17. DIT cited decision notice FS50733330 to support its reliance on these exemptions.⁴ In the request which was the focus of that notice the

³ The UK-Israel Trade and Partnership Agreement was signed on 18 February 2019 and came into force on 1 January 2021.

In February 2022 the government launched a consultation seeing input on aspects of the current trading arrangements between the UK and Israel that could be improved or amended. The UK subsequently launched negotiations for an upgraded Free Trade Agreement with Israel, with the first round of talks taking place in September 2022.

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614681/fs50733330.pdf> in particular paragraphs 29 and 30.

requester had sought information relating to working groups established by the UK Government and various States to support post-Brexit trade negotiations. DIT withheld the information citing section 27. DIT noted that the Commissioner upheld the application of this exemption, as did the First Tier Tribunal.⁵ DIT explained that it had cited this case as an example of a previous case where both the Commissioner and the Tribunal had accepted that section 27 of FOIA was applicable in the context of trade negotiation information.

The Commissioner's position

18. In order for a prejudice based exemption, such as section 27, to be engaged the Commissioner believes 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.
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

19. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by DIT relates to the interests which the exemptions contained at sections 27(1)(a), (c) and (d) are designed to protect.

20. With regard to the second and third criteria, in the Commissioner's view it is plausible to argue that disclosure of information under FOIA that had been shared with the UK in confidence by Israel on the understanding that it would be kept confidential would be likely to have

⁵ Montague v ICO and Department for International Trade (EA/2019/0154)

an impact on relations between the two countries. The Commissioner accepts that such a disclosure risks having a direct impact on future trade negotiations between the UK and Israel, but could also impact on willingness of other countries to share confidential information with the UK in similar circumstances in the future. The Commissioner accepts that this risks having a wider impact on the UK's ability to conduct such negotiations effectively and risks having a further prejudicial impact on the interests sub-sections (c) and (d) are designed to protect. The Commissioner also notes that the withheld information captures information that was not provided by Israel, ie information which offers an internal UK assessment of the matters related to the negotiations. However, the Commissioner is satisfied that disclosure of such information would also present a real and credible risk of harming the UK's relations with Israel and in turn the UK's ability to protect and promote its interests through trade negotiations.

21. Sections 27(1)(a), (c) and (d) are therefore engaged.

Public interest test

22. Section 27 is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest arguments in favour of disclosing the information

23. DIT acknowledged that disclosure of the withheld information would potentially provide the public with further understanding of how the UK Government reached its decision. It also acknowledged that disclosure would offer insight and understanding on DIT's role in promoting economic opportunities and growth for UK businesses and for the British public.

Public interest in maintaining the exemptions

24. However, DIT suggested that disclosure of the information would not necessarily support or enhance the public's understanding of the UK's Trade Working Groups' roles and responsibilities over and above what is already in the public domain.

25. Furthermore, DIT argued that there is clearly a public interest in maintaining trust and confidence in the relationship between UK and Israel. Disclosure of the information would be seen as a breach of trust, which is fundamental to securing good international relations in general. DIT noted that this may in turn impact on other UK Government interests abroad, including, but not limited to, national security, an outcome which would also be clearly against the public interest.

26. DIT also argued that it would be clearly against the public interest to disclose information which could have a detrimental impact on the UK's negotiating positions with Israel, and its position with other countries that it was already negotiating with, or those the UK plan to negotiate with in the future.
27. Finally, DIT explained that it understood the importance of balancing transparency and negotiation objectives and that it takes its responsibilities seriously. To this end, DIT explained that it had established a framework through its Trade Advisory Groups and Strategic Trade Advisory Group whereby a range of experts from businesses and civil society can be consulted sensitively on negotiation developments. DIT explained that it also updates Parliament and the public before negotiations start, after every negotiation round, and once negotiations conclude. It cited a live review of the feedback from a recent consultation with UK businesses on Trade with Israel.⁶

Balance of the public interest arguments

28. The Commissioner agrees that there is a public interest in disclosure of information which would allow the public to better understand the nature of the government's trade discussions with Israel. However, the Commissioner accepts that it would be firmly against the public interest to disclose information which would be likely to harm the UK's position within these negotiations, and in turn its ability to protect and promote the interests of the UK. Moreover, the Commissioner is also conscious that disclosure of this information risks having an impact on the UK's trade negotiation with other states, not simply with Israel. The Commissioner has also taken into account the information that DIT disclosed in response to the request. On balance the Commissioner has therefore concluded that the public interest favours maintaining the exemptions contained at sections 27(1)(b), (c) and (d) and withholding the information.

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

29. DIT also withheld parts of the information on the basis of section 35(1)(a) of FOIA. This states that:

'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

- (a) the formulation or development of government policy'

⁶ <https://www.gov.uk/government/consultations/trade-with-israel-call-for-input>

30. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
31. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
32. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the content of the information in question and its context.
33. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant Minister;
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
34. DIT argued that the information in question related to policy making arising out of trade negotiations with Israel. More specifically, DIT explained that information concerned free trade negotiation matters, involving the coordination of engagement and policy development around a varied range of topics and sectors including policies on services or government procurement and others, as well as policies to support the transition of existing treaties.
35. In support of its reliance on section 35(1)(a) DIT again referenced decision notice FS50733330, specifically paragraphs 50 and 51 which concluded that information relating to trade negotiations could relate to the formulation and development of government policy.
36. Having considered the withheld information the Commissioner accepts the information withheld on the basis of section 35(1)(a) falls within the scope of that exemption because it clearly relates to information that informed the formulation and development of UK's trade policy, specifically in relation to Israel.

Public interest test

37. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

38. The complainant argued that as the UK's trade agreement with Israel had been completed prior to his request being submitted in his view disclosure of the information would not undermine the formulation of policy in this area.
39. For its part, DIT acknowledged the general interest in transparency can further enhance understanding of how government policy is formulated. It also agreed that disclosure may serve to widen the base of stakeholder and public engagement which may in turn assist in the development and scrutiny of policy formulation.

Public interest arguments in favour of maintaining the exemption

40. DIT argued that the information withheld on the basis of this exemption was relevant to the live policy making process and government policy making arising out of trade negotiations with Israel.
41. In its view disclosure of the information would impact on the 'safe space' needed to enable candid discussions and engagement between government officials on policy development on a state-to-state level. DIT explained that the information concerns free trade negotiation matters, involving the coordination of engagement and policy development around a varied range of topics and sectors as well as policies to support the transition of existing treaties. It argued that all of this is of importance to the promotion and enhancement of the UK as an innovative, dynamic and competitive economy. DIT explained that the information withheld on the basis of this exemption contains information that has been gathered for the purpose of informing policy positions to be determined in the process of negotiating the trade deals. It emphasised that the process of gathering information to formulate government policies requires officials to feel free and frank to exchange views and deliberate openly. DIT explained that this prevents officials being inhibited which could impede the way in which information is collected and recorded from foreign states in the Trade Working Group forums. DIT argued that if there is a concern that such information would likely be made public via FOI requests, these forthright discussions would be hindered. Furthermore, DIT argued that it is a clearly established principle of trade negotiations that discussions between parties are held in good faith on a confidential basis. Consequently, DIT argued that regular publication of the detailed,

sensitive contents of negotiations would undermine its ability to negotiate, make concessions and conduct talks in good faith.

42. In addition, DIT argued that removal of this safe space between states could lead to a 'chilling effect' where both it and foreign states are less willing to engage in exploration of new policy ideas to effect trade agreement where there is a risk of adverse public reaction should such proposals not be implemented.
43. DIT also argued that there was a public interest in ensuring a safe space on a domestic level to provide for candid discussions and engagement for government officials on policy development. It argued that ensuring officials and Ministers have safe space for the formulation and development of Government policy is fundamental and in the spirit of making effective policy decisions. Furthermore, DIT argued that Ministers need to be free to consult anyone they choose on any particular matter. This allows Government to consider and explore ideas with external third parties in order to gauge the attitude and reaction to a proposed policy idea. DIT argued that disclosure of this information would weaken the Government's ability to engage and obtain the genuine views of such third parties. An integral part of the decision making within government involves interdepartmental consideration and communication between Ministers, disclosure of information in this context may undermine collective responsibility of government.
44. In addition, DIT explained that trade negotiations involve making concessions from the policy positions initially tabled. If the details of sensitive trade negotiations are to be regularly disclosed then in DIT's view this would limit the Government's ability to concede on matters which have become public record in order to leverage outcomes which are in the UK interest, which will result in worse outcomes once negotiations finish. DIT argued that the appropriate time to publish the contents of treaties is upon conclusion, signature or authentication, once the contents are stable and the policy will not further change.
45. In respect of this case DIT argued that non-disclosure was the correct decision for it to take. It emphasised that trade negotiation with Israel was live and so disclosure of the information in question would be detrimental to the negotiating powers of the UK. In DIT's view the factors for withholding the information from disclosure are weighty, particularly given the ongoing nature of the trade negotiations and any disclosure of the information in question would be to the detriment of the UK's ability to negotiate for its objectives in free trade agreement between UK and Israel, benefitting the UK economy, and UK consumers, producers and businesses.
46. Again, DIT made reference to the fact that it understood the importance of balancing transparency and negotiation objectives and takes its

responsibilities seriously and the steps it already took in this regard which are set out in paragraph 27.

Balance of the public interest arguments

47. With regard to the timing of the request the Commissioner accepts the complainant's point that the UK's trade negotiations in respect of the UK-Israel Trade and Partnership Agreement were completed prior to him making his request. Furthermore, the Commissioner acknowledges that the consultation in relation to reconsideration of the UK-Israel trade arrangements did not start until early 2022.
48. However, in the Commissioner's view this does not mean that policy making in respect of UK-Israel trade negotiations were complete at the point of the request. In the Commissioner's view such a position would not be a realistic one given the events shortly after the time of compliance with the request, eg the consultation launched in February 2022 clearly demonstrate the UK government's intentions to undertake further trade negotiations with Israel. Whilst the actual negotiations may not have been actively taking place at the point the request was submitted (as noted, the initial rounds did not begin until 12 months later in September 2022) the Commissioner is nevertheless satisfied that at the point of the request there is sufficient evidence to indicate the government's intentions to review its trade policy with Israel. Therefore, in the Commissioner's view it is plausible for DIT to argue that at the time of the request policy making in relation to such trade negotiations was live and ongoing. In other words, the Commissioner accepts that policy making regarding trade negotiations is not only live at the point actual negotiations are taking place. Prior policy analysis and work clearly has to be undertaken internally by government departments prior to such activities. In the circumstances of this case the Commissioner is satisfied that the proximity of the request to the launch of the consultation in February 2022 provides him with sufficient evidence that policy making was live at the time of the request.
49. With regard to the weight that should be attributed to the public interest in maintaining the exemption, the Commissioner acknowledges the importance of the UK's trade securing the best trade deals possible. Furthermore, the Commissioner considers that DIT have made a compelling case in relation to the importance of safe space in this case. In his view such arguments attract notable weight given both the timing of the request – which for the reasons discussed above, the Commissioner accepts the policy making was live – and given the content of the information which contains free and frank information shared in a confidential environment. Whilst disclosure of the information at the time of the request would not have impacted on the negotiations themselves – as these had yet to restart – the Commissioner accepts that disclosure would have had a direct impact on

the safe space for policy making in this area and the preliminary work needed to be undertaken prior to the consultation (and subsequent negotiations). Furthermore, the Commissioner accepts that there is a genuine risk that disclosure of information relating to previous negotiations (ie the four meetings falling within the scope of the request) would be likely to have a chilling effect on the candour of contributions to future negotiations if such information was disclosed at a point where the policy making was live and where negotiations were going to take place relatively soon afterwards.

50. With regard to the public interest in favour of disclosure, as noted above the Commissioner agrees that there is a public interest in disclosure of information which would allow the public to better understand the nature of the government's trade discussions with Israel. Disclosure of the information withheld on the basis of section 35(1)(a) would directly meet this aim.
51. However, given the weight that he considers the safe space and chilling effect arguments attract, in particular given the ongoing nature of the policy making, the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 35(1)(a) of FOIA.

Time taken to respond to the request

52. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled, subject to the application of any exemptions:
 - '(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.'
53. Section 10(1) of FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest.
54. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.
55. In this case the complainant submitted his request on 9 September 2021 and DIT issued its substantive response on 23 March 2022. The

Reference: IC-186114-V9S7

Commissioner does not consider this to be a reasonable amount of time in the circumstances of this case and this delay therefore represents a breach of section 17(3).

Right of appeal

56. 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

57. 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.

58. 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

Jonathan Slee
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