

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 17 January 2011**

**Public Authority:** Department for Business, Innovation and Skills  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

### Summary

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The complainant requested various pieces of information regarding export licence applications for Iran that were made in the first two quarters of 2009. Whilst the public authority provided some information, the majority of the information was withheld under sections 23(5), 24(2), 27(1)(a), 27(1)(b), 27(1)(d), 27(2), 36(2)(a)(i), 36(2)(b)(i), 36(2)(b)(ii), 40(2), 41(1), and 43(2). After investigating the case the Commissioner found that some of the requested information was exempt under section 27(1)(a) and 41(1). However, he also decided that some of the requested information should be disclosed as the public authority had incorrectly applied sections 41(1) and 43(2). The Commissioner also found that the public authority had not met with the requirements of sections 10 and 17.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### Background

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2. The Export Controls Organisation ("ECO") – which is part of the Department for Business, Innovation and Skills – is responsible for legislating, assessing and issuing export and trade licences for specific categories of "controlled" goods. This encompasses a wide range of items including dual-use goods, torture goods, radioactive sources, as

well as military items. Whether a licence is required depends on various factors including the items exported and any sanctions in force on the export destination. If items exported from the UK are controlled, then a licence is needed to legally export. The ECO issues licences for export, transshipment and trade control (trafficking and brokering) purposes. These licences are issued by the Secretary of State for Business, Innovation and Skills.<sup>1</sup>

3. A list of items for which a licence is required from the ECO can be viewed at <http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/watwedo/europeandtrade/strategic-export-control/control-lists/page40521.html>
4. In addition to this, some destination countries are subject to embargoes or sanctions. This may mean that additional items also require a licence to export to that destination. Details of the current trade and financial sanctions placed on Iran can be viewed at <http://www.businesslink.gov.uk/bdotg/action/layer?topicId=1084127310>
5. The request in this case refers to the Consolidated EU and National Arms Export Licensing Criteria. The Foreign and Commonwealth Office describes these Criteria in the following way:

*"The consolidated criteria are based on those in the EU Code of Conduct, adopted on 8 June 1998. They also incorporate elements from the UK's previous national criteria, which had been in place since 1997.*

*The consolidated criteria are applied on a case by case basis, taking into account the circumstances prevailing in the country of final destination at the time of export. An export licence will not be issued if the decision is not consistent with the criteria."*<sup>2</sup>

Further details of these criteria can be found at <http://www.fco.gov.uk/resources/en/pdf/3849543/eu-arms-export>.

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<sup>1</sup> <http://www.bis.gov.uk/exportcontrol>

<sup>2</sup> <http://www.fco.gov.uk/en/about-us/what-we-do/services-we-deliver/export-controls-sanctions/strategic-export-controls/>

## The Request

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6. The complainant wrote to the Department for Business, Innovation and Skills ("BIS") on 9 September 2009 and requested the following information:

- "(1) Which companies applied to the Export Control Organisation for export licences for Iran in the first and second quarters of this year [i.e. 2009]?"*
- "(2) For those applications that were refused, on what grounds was there reason for thinking that they would breach either criteria 1 or 7 of the Consolidated EU and National Arms Export Licensing Criteria. Please provide the specific reasoning for each individual application for the first and second quarters of this year [i.e. 2009]."*
- "(3) Please provide the specific application forms for each licence."*
- "(4) What was the total value of export licences refused?"*

For ease of reference the Commissioner will refer to these as requests (1) to (4) throughout the rest of this notice.

7. BIS responded on 7 October 2009 and informed the complainant that there would be a delay in responding to his request as it was considering the public interest test in relation to section 43. It also informed the complainant that it believed that section 40 applied to the requested information. It informed him that it hoped to respond by no later than 4 November 2009.
8. BIS responded on 17 November 2009, and provided the information that it held in relation to request (4). However, it stated that it believed that the information that fell under requests (1), (2) and (3) was exempt from disclosure. In relation to request (1) it stated that this information was exempt from disclosure under sections 41(1) and 43(2). It confirmed that it held some information in relation to request (2), but that this information was exempt under sections 27(1)(a), 27(1)(b), 27(1)(d), 36(2)(a) and 36(2)(b). It also stated that it was relying upon sections 23(5) and 24(2) to neither confirm nor deny whether it held any further relevant information in relation to this request. Finally, in relation to request (3) it stated that this information was exempt from disclosure under sections 40(2), 41(1) and 43(2).

9. The complainant emailed BIS on 17 December 2009 and requested an internal review of its refusal to provide the information set out in requests (1), (2) and (3).
10. BIS carried out an internal review, and responded in an email dated 18 February 2010. It informed the complainant that it upheld its use of sections 41(1) and 43(2) in relation to requests (1) and (3). It also upheld its use of sections 23(5), 24(2), 27(1)(a), 27(1)(b), 27(1)(d), 36(2)(a) and 36(2)(b) in relation to request (2). Finally, it also upheld its use of section 40(2).

## **The Investigation**

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### **Scope of the case**

11. The complainant contacted the Commissioner on 5 March 2010 to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the BIS' refusal to provide the information set out in requests (1), (2) and (3). In addition to this, he also asked the Commissioner to consider whether BIS has complied with the requirements of sections 1 and 10.
12. During the investigation the Commissioner asked the complainant to confirm whether, in relation to request (3), he was seeking access to all the application forms for the first two quarters of 2009, or whether he was only seeking access to those forms that related to failed applications. The complainant confirmed that he was only seeking access to forms that related to failed applications (see paragraphs 17 and 18 below).
13. During the investigation BIS informed the Commissioner that it was also relying upon section 27(2) in relation to request (2). Additionally it explained that it now believed that sections 41(1) and 43(2) also applied to some of the information that fell under request (2) (see paragraph 16 below). Finally, in relation to its use of section 36 it clarified that it believed that sections 36(2)(a)(i), 36(2)(b)(i) and 36(2)(b)(ii) applied to the information that fell under request (2).
14. Therefore the scope of this case is to consider whether BIS was correct to rely upon the following exemptions in relation to the following requests:
  - Request (1) – sections 41(1) and 43(2).
  - Request (2) – sections 23(5), 24(2), 27(1)(a), 27(1)(b), 27(1)(d), 27(2), 36(2)(a)(i), 36(2)(b)(i), 36(2)(b)(ii), 40(2), 41(1) and 43(2).

- Request (3) – sections 40(2), 41(1) and 43(2).

15. In addition to this, the Commissioner has also considered whether BIS has complied with the requirements of sections 1, 10 and 17.

## Chronology

16. The Commissioner wrote to BIS on 13 April 2010 and informed it that he had received a complaint from the complainant in this case. BIS wrote to the Commissioner on 25 June 2010 and provided him with detailed initial submissions to support its use of the above exemptions. In relation to request (2) it clarified that it was relying upon sections 36(2)(a)(i), 36(2)(b)(i) and 36(2)(b)(ii), and added that it was also relying upon sections 27(2), 41(1) and 43(2) to withhold this information. It also provided the Commissioner with a sample of the withheld information.
17. The Commissioner wrote to the complainant on 13 September 2010 and referred him to two cases that had dealt with requests of a similar nature (one of which had also been considered at the Information Tribunal).<sup>3</sup> Bearing in mind the outcome of these cases, he asked the complainant whether he wished to continue with all the aspects of his complaint. In addition to this he also asked the complainant to confirm whether he was complaining about BIS' use of section 40(2). Finally, he asked the complainant to clarify whether the information requested in request (3) was in relation to all application forms, or only those that were unsuccessful.
18. The complainant wrote to the Commissioner on 4 October 2010 and confirmed that he did wish to continue with all aspects of his complaint, including BIS' use of section 40(2). He also confirmed that, in relation to request (3), he was only seeking access to forms that related to failed applications.
19. The Commissioner wrote to BIS on 28 October 2010 and requested further submissions in relation to its use of the exemptions it was relying upon.
20. BIS responded in an email dated 12 November 2010 and provided further submissions. Finally, in a telephone conversation on 22 November 2010 it clarified that in relation to its application of section 27(1)(a) it believed that disclosure of the information that fell under request (2) would cause actual prejudice.

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<sup>3</sup> FS50086622 (Department for Trade and Industry); FS50180838 (Department for Business, Enterprise and Regulatory Reform); *Gibbons v ICO & the Department for Business, Enterprise and Regulatory Reform* [EA/2009/0002].

## Analysis

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### Exemptions

21. The Commissioner has considered the use of the exemptions in relation to each request in turn.

### Request (1)

22. As noted above, BIS has relied upon sections 41(1) and 43(2) to withhold this information. The Commissioner has first considered the application of section 41(1).

#### Section 41

23. Section 41(1) provides that information is exempt from disclosure if:
- (a) it was obtained by the public authority from any other person; and
  - (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

The full text of section 41 can be found in the Legal Annex at the end of this notice.

24. The Commissioner has adopted the approach to confidentiality taken by the court in *Coco v A N Clark (Engineers) Limited [1968] FSR 415*. In that case it was decided that disclosure would constitute an actionable breach of confidence if:
- the information has the necessary quality of confidence;
  - the information was imparted in circumstances importing an obligation of confidence; and
  - disclosure would be an unauthorised use of the information and to the detriment of the confider.

If these parts of the test are satisfied, the Commissioner believes that he should then consider whether there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information.

25. The Commissioner has first considered whether the information was obtained from a third party or parties.

Was the information obtained from a third party or parties?

26. The information in question is the names of companies who have applied to the ECO for export licenses for Iran in the first and second quarters of 2009. Given this, the Commissioner is satisfied that this information was provided to BIS by third parties.
27. The Commissioner has gone on to consider whether the disclosure of this information would constitute an actionable breach of confidence. In order to reach a view on this he has first considered whether the information has the necessary quality of confidence.

Necessary quality of confidence

28. In considering whether the withheld information has the necessary quality of confidence the Commissioner has considered whether it is otherwise accessible, and whether it is more than trivial.
29. In its letter to the Commissioner dated 25 June 2010 BIS argued that the withheld information is sensitive commercial information that would not, in the majority of cases, be publically available, i.e. the fact that a particular company had applied for an licence to export certain goods to Iran. BIS accepted that once an export licence had been granted, a company might publicise this fact. However it noted that there were over 500 applications in the time period specified by this request, and argued that it would not be practicable to check whether this had occurred in every instance. In addition to this, it also argued that it was unlikely that a company which had been unsuccessful in obtaining an export licence would publicise the fact.
30. The Commissioner agrees that the fact that a company had applied for an export licence with Iran would generally not be in the public domain. He agrees that once an export licence had been granted, a company might publicise this fact. However, he accepts that given the numbers of applications involved it is not practicable to establish whether this had occurred in every instance. Instead he believes that it is reasonable to assume that, generally speaking, companies do not proactively publish details of countries they have had to obtain an export licence from the ECO in order to export goods to. In addition to this, he agrees that it is unlikely that a company which had been unsuccessful in obtaining an export licence would publicise the fact.
31. Therefore the Commissioner is satisfied that in general, the withheld information was not likely to be widely accessible at the time of the request. Nor has he been presented with evidence to suggest that this is the case. Furthermore he is satisfied that this information is not trivial.

Obligation of confidence

32. The Commissioner has gone onto consider whether the information was imparted in circumstances giving rise to an obligation of confidence.

33. In the internal review BIS argued that,

*"Information in licence applications is supplied in circumstances where exporters consider the information to be confidential and in the expectation that BIS will preserve that confidentiality."*

34. BIS expanded upon this argument during the investigation of this case. It argued that,

*"An applicant for an export licence has to submit sufficient information to allow the Secretary of State to determine whether or not to grant an export licence. This information will include details of the goods to be exported to technology to be transferred as well as details of the intended end use and final recipient. The Secretary of State (via the Export Control Organisation...) will be in receipt of a significant amount of information, which is commercially sensitive. Although strictly speaking there is no statutory provision requiring this information to be provided, if it is not it is unlikely that a licence will be issued. As a result there is a long standing understanding across the exporting community that BIS and the other Departments involved in the export licensing process will treat applications for export licences (and related information) as being supplied in confidence (both the names of the companies applying for an export licence...and the application forms themselves and any accompanying information...). This is accepted by and maintained by the public authorities concerned.*

*Although the licence application form itself does not contain a 'confidentiality statement' it explicitly states the circumstances in which data will be shared e.g. with other government departments and international organisations...Companies making licence applications do not expect the information they supply to be disclosed outside this group and otherwise expect it to be treated as confidential."*

35. BIS added that given the number of companies involved it had not been able to consult them in order to establish whether they consented to the disclosure of this information. However, it noted that it had consulted individual companies in the past regarding the potential disclosure of the information they had submitted as part of the export licensing process. Those companies had almost invariably refused, *"the exceptions being very rare and related to the specific circumstances of individual cases"*.



36. Bearing these points in mind, the Commissioner believes that companies applying for an export licence would not reasonably expect the details of the application to be put into the public domain by BIS (this would include the names of the companies). Whilst the ECO publishes some details of the granting of export licences in an annual report and in other published statistics, the Commissioner notes that this does not include the names of specific companies or the details of their applications.<sup>4</sup> Furthermore, the Commissioner notes that in many instances a company would apply for an export licence before it had concluded its deal with its prospective trading partner in Iran. As such, he believes that the company would reasonably expect BIS to treat the details of a prospective export as confidential.
37. In the case of *Coco v A N Clark (Engineers) Limited [1968] FSR 415* the judge suggested that in considering what constitutes a circumstance giving rise to an obligation of confidence the 'reasonable person' test may be useful,

*"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 given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."*

38. Bearing in mind the circumstances in which companies apply to BIS for an export licence, the Commissioner is satisfied that it would be reasonable for the companies concerned to expect that information about their application for an export licence to be treated as confidential. Therefore the Commissioner is persuaded that this information was provided to BIS in circumstances that imported an obligation of confidence.

#### Detriment to the confider

39. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. In some cases, for example involving the personal information of individuals acting in their private capacities, there is no need to prove the element of detriment. However where commercial information is purported to have been imparted in confidence the Commissioner considers that there would have to be a detrimental impact to the commercial interests of the confider for the exemption to be engaged. This approach was supported by the Tribunal

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<sup>4</sup> <http://www.fco.gov.uk/resources/en/pdf/about-us/our-publications/sec-annual-report-2010>; <https://www.exportcontroldb.berr.gov.uk/eng/fox>

in *The Higher Education Funding Council for England v ICO & Guardian News and Media Ltd* [EA/2009/0036].<sup>5</sup>

40. In its letter to the Commissioner dated 25 June 2010 BIS argued that the disclosure of the withheld information would have detrimental effects to the confiders. It relied upon the same arguments as those it made for the application of section 43(2) (these are detailed in full at paragraph 125 below). However, after considering these arguments at length, the Commissioner notes that the majority relate to the potential negative effects that would be caused if the full details of the licence application forms were to be released. In relation to the information requested at request (1) the Commissioner believes that the only relevant argument made by BIS was that knowledge that a company was seeking to trade with a company in Iran, and that the goods it sought to export were such that they required an export licence, could damage that company's reputation and its future business opportunities, *"as some potential customers would not be prepared to deal with it."*
41. During the investigation the Commissioner wrote to BIS and asked it to provide further arguments as to how the disclosure of the information requested at request (1) would cause detriment to the interests of the confiders.
42. BIS provided further arguments in its email of 12 November 2010. It again argued that disclosure of this information could risk criticism from those who have concerns about such trade activity with Iran. This could harm the reputation of the companies in question, which could lead to some individuals or companies choosing to avoid dealing with a company that is known to have had, or to be seeking to obtain, trading opportunities with Iran.
43. The Commissioner has considered this argument carefully. He is aware of the sensitive nature of international relations between the UK and Iran. However, he has had to consider whether the disclosure of the information requested under request (1) would be likely to have a damaging impact on the reputations of the companies in question and, if so, that that reputational damage would be such that future customers (individuals or companies) would avoid doing business with them in the future.
44. The information in question consists of a list of companies who have applied for a licence to export certain (unnamed) goods to end users in Iran over a specified time period. The information does not, in itself, show the details of what was to be exported, nor whether the

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<sup>5</sup> EA/2009/0036, para 43.

application was successful. As noted at paragraphs 2 to 4, there are a wide range of goods that require an export licence in order to be exported from the UK to Iran – some of which would be more controversial than others. Therefore, whilst the Commissioner accepts that the intended export of certain goods to Iran might be highly controversial, given the breadth of the types of goods requiring an export licence (especially in relation to 'dual use' goods) he does not believe that every licence application would automatically be considered to be linked to a highly controversial potential export. Again, he also notes that the information requested at request (1) does not show any details of the applications.

45. In addition to this, the Commissioner is not aware of any major boycott campaign against companies that trade, or seek to trade, with companies in Iran. Nor has BIS provided any evidence of such a campaign.
46. Bearing these points in mind, the Commissioner does not find this argument persuasive, and in particular does not believe that BIS has provided the necessary evidence of a causal link between the disclosure of the withheld information and any potential detriment to the interests of the confider of the information in this way.
47. In addition to this, BIS also argued that the disclosure of this information could have a detrimental effect on the UK's system of export control, as it might discourage companies from applying for a licence and instead try and avoid the system of export controls, or trade through an overseas subsidiary company. This, BIS has argued, would be against the UK's national and international interests. However, the Commissioner notes that the third element of the test of confidence is whether the disclosure of the information would cause likely detriment to the confider. Therefore, as this argument relates to the potential prejudice to the UK's national and international interests, rather than to the companies concerned, the Commissioner is unable to take this argument into consideration at this stage.
48. After taking into account the arguments and evidence presented by BIS the Commissioner is not satisfied that the disclosure of the information requested at request (1) would have a detrimental impact on the interests of the confiders. As such he does not accept that the disclosure of this information would result in an actionable breach of confidence. Therefore he finds that section 41 is not engaged in relation to the information that falls under request (1).
49. As he has found that section 41 is not engaged in relation to this information the Commissioner has not gone on to consider whether

there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information.

50. The Commissioner has gone on to consider the application of section 43(2) to this information.

### **Section 43**

51. Section 43(2) states that information is exempt if its disclosure under the Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
52. The full text of section 43 can be found in the Legal Annex at the end of this notice.
53. BIS has argued that the disclosure of the information that falls under request (1) would be likely to prejudice the commercial interests of the companies named in this information.
54. The Commissioner has first considered whether the withheld information, and the potential prejudicial effects described by BIS would relate to commercial interests.
55. The withheld information consists of the names of companies who have applied to the ECO for export licenses for Iran in the first and second quarters of 2009. This information relates to commercial companies, and was provided to BIS in relation to potential commercial ventures. As such, the Commissioner is satisfied that this information relates to commercial interests. Furthermore, after considering BIS's arguments the Commissioner is satisfied that the potential prejudicial effects would relate to the commercial interests of the companies concerned. Therefore he is satisfied that the withheld information falls within the scope of the exemption.
56. Next the Commissioner has to consider whether the disclosure of this information would be likely to prejudice the commercial interests of the companies concerned.

### The prejudice test

57. In reaching a decision on the question of the likelihood of prejudice the Commissioner has been mindful of the test of 'likely to prejudice' as enunciated by Mr Justice Mundy in the case of *R (on the application of Lord) V Secretary of State for the Home Office [2003] EWHC 2073*, and followed by the Tribunal in the case of *John Connor Press Associates Limited v ICO [EA/2005/0005]*, where the Tribunal interpreted the expression 'likely to prejudice' as meaning that, "*the chance of prejudice*

*being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."*<sup>6</sup>

58. In reaching a decision on the likelihood of prejudice the Commissioner also believes that the public authority should be able show some causal link between the potential disclosure of the withheld information and the prejudice it has argued is likely to occur.
59. In cases where a public authority argues that disclosure of the requested information would or would be likely to prejudice a third party the Commissioner is guided by the views of the Tribunal in *Derry City Council v ICO* [EA/2006/0014]. In that case the Council argued that the commercial interests of a third party, Ryanair, would be likely to be prejudiced if the requested information were disclosed. The Council did not ask Ryanair for its views as to whether it believed its commercial interests would be likely to be prejudiced nor did Ryanair present any evidence to the Tribunal. The arguments put forward by the Council to the Commissioner as well as to the Tribunal were based upon the Council's thoughts on the point and not on representations made by Ryanair. In the absence of any evidence from Ryanair the Tribunal stated that it was unable to conclude that Ryanair's commercial interests would be likely to be prejudiced.<sup>7</sup>
60. The Commissioner considers that this approach may not be appropriate in every case and therefore public authorities may sometimes have to formulate their arguments based on their prior knowledge of a third party's concerns rather than directly contacting a third party. However the Commissioner still expects a public authority to provide evidence that these arguments genuinely reflect the concerns of the third party involved rather than merely speculate about the prejudice that may be caused to the third party.
61. In this instance, the Commissioner notes that BIS (in relation to section 41) has already referred to the fact that given the large number of licence applications that would fall within the scope of the request, it would be impracticable for it to approach each of the companies concerned (see paragraph 29). However, he also notes its comments that when it had consulted individual companies in the past regarding the potential disclosure of the information they had submitted as part of the export licensing process those companies had almost invariably refused (see paragraph 35).

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<sup>6</sup> EA/2005/0005, para 15.

<sup>7</sup> EA/2006/0014, para 24.

62. Bearing this in mind, and after considering the nature of the withheld information, the Commissioner is satisfied that BIS' arguments genuinely reflect the concerns of the third parties involved.
63. In the refusal notice BIS argued that the disclosure of the withheld information would be likely to prejudice the commercial interests of the named companies,

*"...because this would reveal details of the markets that companies are operating in and possibly details of commercial opportunities that are still available (to non-UK exporters in the case of UK refusals."*

This argument was repeated at internal review.

64. In considering this argument the Commissioner has again noted the contents of the information that falls under the scope of request (1). The information does not, in itself, show the details of what was to be exported, or the identity of the end user. Instead, the information consists of a list of companies who applied for an export licence to export certain goods with unnamed end users in Iran. In addition, the Commissioner again notes the wide range of goods that require an export licence in order to be exported from the UK to Iran. Whilst he accepts that in limited circumstances, it could be envisaged that because of the uniqueness of a company's product, it would be possible to identify the potential export of that product purely from the name of the company, he notes that this is not an argument that has been made by BIS.
65. BIS provided further arguments in its letters to the Commissioner dated 25 June 2010 and 12 November 2010. As noted at paragraph 40 above, its central argument in relation to this information was that disclosing the fact that a company was seeking to export goods to Iran would damage its reputation to such an extent as to harm its future business opportunities – as some potential customers would not be prepared to deal with it any longer.
66. The Commissioner notes that this is the same argument as has been used in relation to section 41, and that he has already considered it at length when considering the application of that exemption. For the same reasons as those given at paragraphs 43 to 46 above, the Commissioner does not find this argument persuasive.
67. In addition to this, BIS also provided arguments as to how the disclosure of the details of the licence application forms would disclose commercially sensitive information, leading to likely prejudice to the commercial interests of the companies concerned (these are detailed in full at paragraph 125 below). However, after considering these

comments at length, the Commissioner notes that they are more applicable to the information that falls under request (3). Taking into account the nature of the information that falls under the scope of request (1), and as argued at paragraph 64 above, he does not accept that this information, in itself, is particularly commercially sensitive. In particular, he does not accept that the disclosure of this information, in itself, would lead to the likely prejudicial effects argued by BIS.

68. Bearing in mind the test of prejudice as outlined at paragraphs 57 and 58 above, and taking into account all the above factors, the Commissioner is not satisfied that the disclosure of the withheld information would be likely to prejudice the commercial interests of companies named in the withheld information.
69. Therefore the Commissioner finds that section 43(2) is not engaged in relation to request (1).
70. As the Commissioner has found that this exemption is not engaged he has not gone on to consider the public interest test in relation to this exemption.

## **Request (2)**

71. In relation to request (2), BIS has relied upon sections 27(1)(a), 27(1)(b), 27(1)(d), 27(2), 36(2)(a)(i), 36(2)(b)(i), 36(2)(b)(ii), 40(2), 41(1) and 43(2) to withhold this information. It has also relied upon sections 23(5) and 24(2) in order to refuse to confirm or deny whether it holds any additional information that falls under the scope of this request.
72. The Commissioner has first considered the application of section 27 to this information.

## **Section 27**

73. BIS has relied upon sections 27(1)(a), 27(1)(b), 27(1)(d) and 27(2) to withhold the information that falls under the scope of request (2).
74. Under section 27(1) information is exempt if its disclosure under the Act would, or would be likely to, prejudice:
  - (a) relations between the United Kingdom and any other State,
  - (b) relations between the United Kingdom and any international organisation or international court,
  - (c) [...]

(d) the promotion or protection by the United Kingdom of its interests abroad.

75. Under section 27(2) information is exempt if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court

76. This is a qualified exemption and is therefore subject to a public interest test.

77. The full text of section 27 can be found in the Legal Annex at the end of this notice.

78. The Commissioner has first considered the application of section 27(1)(a).

#### Section 27(1)(a)

79. In support of its use of this exemption, in the refusal notice BIS argued that,

*"...even if releasing the information would not further harm our relationship with Iran, there are other States and international organisations who would be likely to object to the release of this information."*

This argument was repeated at internal review.

80. BIS provided further arguments in its letter to the Commissioner dated 25 November 2010. In particular, it argued that other Governments, including Iran, *"would be likely to object to such information becoming public knowledge and their subsequent actions might be to the detriment of UK relations with those Governments."*

81. It also argued that disclosure would cause serious harm to the UK's relations with other States who had provided information that may have fed into the decision not to grant an export licence.

82. Finally, it argued that disclosure would prejudice relations between the UK and other States where the information was about the activities of the Government of that State, or companies, individuals or non-Government organisations within that State.

83. BIS has also confirmed that it believes that the disclosure of the information that falls under the scope of request (2) would cause actual prejudice.



84. The Commissioner has first considered whether the withheld information, and the potential prejudicial effects described by BIS, relates to the UK's international relations with other States.
85. The withheld information consists of details of the reasons why export licence applications were turned down, specifically on what grounds was there reason for thinking that they would breach either criteria 1 or 7 of the Consolidated EU and National Arms Export Licensing Criteria. Having examined a sample of this withheld information the Commissioner is satisfied that it contains details of why applications were turned down for these reasons, and also includes details of information provided to BIS by third parties, and details of the potential activities of end users in Iran. Bearing this in mind, together with BIS' arguments in relation to its use of this exemption, the Commissioner is satisfied that this information relates to international relations. Furthermore, after considering BIS' arguments the Commissioner is satisfied that the potential prejudicial effects relate to the UK's international relations with other States. Therefore he is satisfied that the withheld information falls within the scope of section 27(1)(a).
86. Next the Commissioner has to consider whether the disclosure of this information would prejudice the UK's international relations with other States. Given the wording and scope of the request, the Commissioner has first considered whether the disclosure of this information would prejudice the UK's international relations with Iran.
87. In reaching a decision on the question of actual prejudice the Commissioner has been mindful of the views of the Tribunal in *Hogan v ICO and Oxford City Council* [EA/2005/0026 and EA/20005/0030] which noted that ,

*"The [...] prejudice test is not restricted to 'would be likely to prejudice'. It provides an alternative limb of 'would prejudice'. Clearly this second limb of the test places a much stronger evidential burden on the public authority to discharge."*<sup>8</sup>

The Commissioner has interpreted this to mean that in cases where a public authority has argued that disclosure would cause prejudice, whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.

88. In reaching a decision on whether disclosure would cause actual prejudice the Commissioner also believes that the public authority should be able show some causal link between the potential disclosure

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<sup>8</sup> EA/2005/0026 and EA/20005/0030, para 36.

of the withheld information and the prejudice it has argued is likely to occur.

89. In reaching a view on this the Commissioner has also been mindful of the Tribunal's views in *Campaign against the Arms Trade V ICO & the MoD* [EA/2006/0040], which considered the application of section 27(1). In particular, whilst considering potential prejudice to international relations and UK interests abroad, the Tribunal stated that,

*"As a matter of approach the test of what would or would be likely to prejudice relations or interests would require consideration of what is probable as opposed to possible or speculative. Prejudice is not defined, but we accept that it imports something of detriment in the sense of impairing relations or interests or their promotion or protection and further we accept that the prejudice must be real, actual or of substance..."*

*...we would make clear that in our judgment prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the KSA [Kingdom of Saudi Arabia] or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty. The prejudice would lie in the exposure and vulnerability to that risk. Similar considerations would apply to the effect on relations between the UK and the KSA..."<sup>9</sup>*

90. In relation to its arguments about the prejudice to relations with Iran, the Commissioner notes that BIS' arguments are somewhat limited, and do not go into any more context or detail than that given above. In his email to BIS dated 28 October 2010 the Commissioner asked it to provide further submissions in relation to this argument – however, it did not do so. Nevertheless, given the prejudice that it argued would occur, should this information be disclosed, the Commissioner has carefully considered this issue. Given BIS' arguments about the strong likelihood of prejudice to international relations with Iran, he has also

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<sup>9</sup> EA/2006/0040, paras 80-81.

considered the context of the request, i.e. the condition of relations between the UK and Iran at the time of the request.

91. As noted above, the withheld information consists of details as to why export licence applications were turned down when there was reason for thinking that the proposed export would breach either criteria 1 or 7 of the Consolidated EU and National Arms Export Licensing Criteria. In summary, criteria 1 is a statement that the UK Government will not issue an export licence if approval would be inconsistent with its international obligations under a number of anti-proliferation of arms treaties. Criteria 7 refers to the existence of a risk that the equipment will be diverted within the buyer country to an undesirable end-user or re-exported under undesirable conditions, and states that,

*“In assessing the impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user, the following will be considered:*

- a. the legitimate defence and domestic security interests of the recipient country, including any involvement in UN or peace-keeping activity;*
- b. the technical capability of the recipient country to use the equipment;*
- c. the capability of the recipient country to exert effective export controls.*

*The Government will pay particular attention to the need to avoid diversion of UK exports to terrorist organisations. Proposed exports of anti-terrorist equipment will be given particularly careful consideration in this context.”<sup>10</sup>*

92. Therefore, without detailing the contents of the withheld information, it is reasonable to state that it contains details of why BIS was concerned about the proposed export or potential end-use of the goods that the licence applications related to. These concerns related to the proposed or potential end-use of these goods in Iran, or (potentially) the re-export of those goods by end-users in Iran under ‘undesirable conditions’.
93. Although he has not been provided with any examples by BIS, the Commissioner has gone on to consider the context of the request, i.e. the condition of international relations between the UK and Iran at the time of the request.

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<sup>10</sup> <http://www.fco.gov.uk/resources/en/pdf/3849543/eu-arms-export>

94. Relations between the UK and Iran have been strained for some time, and this has been especially the case in recent years. For example, in 2007 Iranian forces seized a number of Royal Naval personnel whom, it alleged, had strayed into Iranian territorial waters. These relations have been put under increasing strain following a number of EU and UN economic and financial sanctions against Iran (see paragraph 4 above). The Commissioner notes that at the time of the request in September 2009 relations between the UK and Iran had been further damaged, following the repercussions of the disputed Presidential Election in Iran in June 2009. In addition to this, he notes that in late November 2009 five British yachtsmen had been seized by the Iranian Navy after their yacht drifted into Iranian territorial waters.<sup>11</sup> Therefore, the Commissioner is satisfied that international relations between the UK and Iran were particularly strained at the time that BIS was dealing with this request and carrying out the internal review.
95. Given the nature of the withheld information, and the role that economic and financial sanctions have played (and continue to play) in the wider issue of the concerns that the UK Government (and the wider international community) has in relation to Iran, the Commissioner is satisfied that the withheld information is potentially highly sensitive. In reaching this view he has particularly borne in mind that the withheld information is held by a department of the UK Government, and relates to concerns that potential exports would be used in Iran for purposes that went against the criteria described at paragraph 91. Given this, the Commissioner is satisfied that there is a strong likelihood that the disclosure of this information would be highly likely to make relations between the UK and Iran more difficult, or call for a particular diplomatic response to contain or limit damage which would not otherwise have been necessary.
96. Therefore after considering these points, and given the nature of relations between the UK and Iran at the time of the request, the Commissioner is satisfied that the disclosure of this withheld information would prejudice international relations with Iran. Therefore, he believes that section 27(1)(a) is engaged.
97. The Commissioner has gone on to consider whether the public interest in maintaining section 27(1)(a) outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

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<sup>11</sup> <http://news.bbc.co.uk/1/hi/uk/8387469.stm>

98. BIS has recognised that there is a general public interest in the disclosure of information, as greater transparency increases the transparency of Government. In addition to this, it has also recognised that there is a public interest in furthering the public understanding of, and participation in the debate on, issues related to Iran.

Public interest arguments in favour of maintaining the exemption

99. BIS has argued that it is of critical importance that diplomatic relationships are maintained.

Balance of the public interest arguments

100. The Commissioner recognises that there is a public interest in openness and accountability. In the particular circumstances of the case, there is a public interest in increasing public understanding in how the export licensing process works. This can be split into two further arguments. Firstly, given the serious nature of the specified criteria under which the licence applications in this case were turned down, there is a public interest in improving the public understanding that the licence application process is working effectively. Secondly, given the potential financial value of the export licence applications that were turned down under these criteria during the period in question (BIS confirmed to the complainant that these were worth £26,581,186.47), there is a public interest in improving public understanding that the application process is being carried out fairly, and that refusals to grant a licence are appropriate and proportionate. The Commissioner is satisfied that the disclosure of this information would help improve that understanding.

101. However, the Commissioner has to balance these public interest arguments in favour of disclosure against those in favour of maintaining the exemption.

102. In particular, the public interest in disclosure has to be balanced against the public interest in avoiding the prejudice as set out in the text of section 27(1)(a), i.e. avoiding unnecessary prejudice to the UK's international relations with Iran. When attributing weight to this public interest factor in favour of maintaining the exemption, the Commissioner accepts that it is very strongly in the public interest that the UK enjoys effective relations with other States. Whilst he accepts that relations between the UK and Iran are already strained, the Commissioner finds the argument against avoiding any further unnecessary strain to that relationship particularly weighty. Furthermore, in the particular circumstances of this case, as the Commissioner has found that prejudice would occur were this information to be disclosed, he believes that the public interest in maintaining the exemption should be given further weight.

103. In addition to this, in relation to the public interest argument in favour of increasing openness and accountability, and increasing public understanding in how the export licensing process works, the Commissioner notes that the ECO already publishes some information about the export licence process. This includes statistical information on the numbers of licences granted and refused, and some information on the number refused because of concerns over criteria 1 and 7 of the Consolidated EU and National Arms Export Licensing Criteria.<sup>12</sup> Whilst the Commissioner acknowledges that this published information does not include specific details as to why applications were turned down, he believes that it does go some way to satisfying this public interest factor.
104. The Commissioner recognises that the public interest factors in this case are compelling both for and against disclosure. However, he has noted, in particular, the strength of the public interest in avoiding unnecessary prejudice to the relations between the UK and Iran. This public interest factor is particularly weighty given that the Commissioner has found that disclosure would cause actual prejudice. Furthermore he considers that the information put into the public domain by BIS goes some way towards satisfying the public interest in favour of disclosure. Bearing this in mind, and having taken into account all of the above factors, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.
105. Therefore, the Commissioner is satisfied that the information that BIS has confirmed that it holds that falls under the scope of request (2) is exempt from disclosure under section 27(1)(a). As he has found that this information is exempt by virtue of prejudice to relations with Iran, the Commissioner has not gone on to consider BIS' other arguments under this exemption – that disclosure would prejudice relations with other States.
106. As the Commissioner has found that all the information that BIS confirms that it holds in relation to this request is exempt under section 27(1)(a), he has not gone on to consider the application of sections 27(1)(b), 27(1)(d), 27(2), 36(2)(a)(i), 36(2)(b)(i), 36(2)(b)(ii), 40(2), 41(1) and 43(2).

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<sup>12</sup> <http://www.fco.gov.uk/resources/en/pdf/about-us/our-publications/sec-annual-report-2010>; <https://www.exportcontroldb.berr.gov.uk/eng/fox>

### **Sections 23 and 24**

107. As noted at paragraph 71 above, BIS has relied upon section 23(5) and 24(2) to refuse to confirm or deny whether it held any further information that fell under the scope of request (2). However, as the Commissioner has found that all the information that is held by BIS that falls under request (2) is exempt under section 27(1)(a) he has not gone on to consider the application of these exemptions.

### **Request (3)**

108. Finally, the Commissioner has considered BIS' handling of request (3). BIS has relied upon sections 40(2), 41(1) and 43(2) to withhold the information that it holds that falls under the scope of this request.

109. The Commissioner has first considered BIS' application of section 41(1) in relation to this information.

### **Section 41**

110. The details of section 41, and the Commissioner's approach to this exemption, are set out at paragraphs 23 and 24 above.

111. The Commissioner has first considered whether the information was obtained from a third party or parties.

112. The information in question is the application forms of companies who were seeking an export licence for Iran in the first and second quarters of 2009 – where those applications were unsuccessful. Given this, the Commissioner is satisfied that the application forms were provided to BIS by third parties.

113. The Commissioner has gone on to consider whether the disclosure of this information would constitute an actionable breach of confidence. In order to reach a view on this he has first considered whether the information has the necessary quality of confidence.

#### Necessary quality of confidence

114. In considering whether the withheld information has the necessary quality of confidence the Commissioner has considered whether it is otherwise accessible, and whether it is more than trivial.

115. BIS' arguments in relation to this information were broadly speaking the same as those detailed at paragraph 29 above. In addition, BIS has also pointed out that the withheld information contains details of proposed exports, prospective customer, and cost or value of components.

116. Bearing this in mind, and after considering the samples of the withheld information provided by BIS, the Commissioner is satisfied that this information is not trivial as it reveals significant commercial information about the applicant companies, their products, the details of proposed commercial deals, and their prospective customers and markets.
117. Therefore the Commissioner is satisfied that the withheld information was not likely to be widely accessible at the time of the request.

Obligation of confidence

118. The Commissioner has gone onto consider whether the information was imparted in circumstances giving rise to an obligation of confidence.
119. The Commissioner has already considered this issue in relation to the information that is held that falls under the scope of request (1) – as detailed at paragraphs 33 to 38 above.
120. For the same reasons as given in relation to request (1) the Commissioner is satisfied that it would be reasonable for the companies concerned to expect that information about their application for an export licence to be treated as confidential. Therefore the Commissioner is satisfied that this information was provided to BIS in circumstances that imported an obligation of confidence.

Detriment to the confider

121. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. As noted at paragraph 39, in relation to commercial information the Commissioner considers that there would have to be a detrimental impact on the confider for the exemption to be engaged.
122. As noted at paragraphs 40 and 42, BIS has argued that the disclosure of this information would damage the reputation of these companies, as trade with Iran is considered controversial by some individuals or companies, and these prospective customers may avoid doing business with them in the future.
123. The Commissioner has already considered this argument in detail at paragraphs 43 to 46. Although he accepts that the disclosure of this information would reveal details of the goods that the companies concerned were intending to export, the Commissioner does not find this factor in itself to be conclusive. Again he notes that he is not aware of any major boycott campaign against companies that trade, or seek to trade, with companies in Iran. Furthermore, he is not satisfied that BIS has provided persuasive evidence of a causal link between the disclosure



of the withheld information and any potential detriment to the interests of the confider of that information in this way.

124. BIS has also argued that the withheld information contains commercially sensitive information, the disclosure of which would be detrimental to the confider. In the internal review it stated that disclosure of this information could reveal,

*"...details of commercial opportunities that are still available (to other UK competitors and, in the case of UK refusals, to non-UK exporters). Information in licence applications includes sensitive commercial information (including in particular as to the exporter's customers and the value of goods to be exported) that could be of use to competitors."*

125. In addition to this, in its letter to the Commissioner dated 25 June 2010, BIS provided further arguments as to how the disclosure of this information would be likely to prejudice the commercial interests of the companies who had provided these application forms. Although these arguments relate to the application of section 43(2), given that they refer to the potential detriment to the (commercial) interests of the confiders, the Commissioner is satisfied that it is appropriate to consider them when determining the application of section 41. BIS argued that disclosure would be likely to cause detriment as:

- The withheld information was only 3 to 8 months old at the time of the request, and therefore related to recent applications.
- Information on the application forms relates to the details of contractual terms and the scope of the contract. These details are commercially sensitive and disclosure could damage the commercial interests of the applicant.
- In particular, information as to the precise scope, extent and value of the overall supply, and the pricing of different items listed on the application would be of great interest to competitors.
- Companies who had identified and nurtured or developed market opportunities ahead of their competitors would face fiercer competition in those markets and be likely to lose potential business as a result.
- The knowledge that a company had lost out on an export opportunity because an export licence had been refused could adversely affect the commercial reputation of that company.
- Overseas purchasers / end customers may be reluctant to deal with the UK companies again in the future if the commercially sensitive

information on the application forms was disclosed, given that they would see the likelihood of disclosure happening again as high.

- Where it was revealed that an export licence had been refused to a UK company an overseas competitor operating under a more relaxed export control system that the UK's could step in and take the business.

126. During the investigation of the case the Commissioner asked BIS to provide further arguments as to how the disclosure of the details of unsuccessful export application forms would cause detriment to the confiders. BIS referred to the Commissioner again to the arguments that it had already made. It also pointed out that,

*"It is also not unusual for an application to be partially successful – this is where as export licence is refused for only some of the line items that appear on the application forms...Disclosure of these forms would therefore reveal details of a contractual agreement between the UK company and the Iranian entity that was partially successful."*

127. It added that whether an application had been unsuccessful in its entirety or only partially unsuccessful did not alter its belief that were the withheld information to be disclosed,

*"...competitors (both UK and overseas) might use this information to the detriment of the companies concerned and...might make overseas purchasers/end customers reluctant to deal with the UK companies in the future if the commercially sensitive information on the application forms was disclosed."*

128. The central question here is how commercially sensitive is this information, given that the application forms in question relate to licence applications that were (wholly or partially) unsuccessful? In reaching a view on this the Commissioner has considered the nature of the withheld information. It consists of details of the goods that the company concerned was seeking to export, together with details of the agreed prices for those goods, and details of the proposed customer/recipient of those goods. Given that this information was less than 8 months old at the time of the request, the Commissioner is satisfied that it would give a potentially valuable insight into the applicant companies' pricing structures and commercial activities. Although these applications to export these goods to Iran were obviously unsuccessful, the Commissioner notes that these companies could be seeking to trade these goods to other markets, and as such he believes that the pricing of these goods could be commercially sensitive. In addition to this, he also notes that it is possible that these companies were trading (or

intending to trade) with the same customers in Iran in relation to other goods (which may not require a licence, or may have had a licence provided). Therefore, given the fact that this information was relatively recent at the time of the request, the Commissioner is satisfied that information about prospective or established customers in Iran would be of potential use to the competitors of these companies. Bearing these points in mind, the Commissioner is satisfied that this information is commercially sensitive to the confiding companies, and that the disclosure of this information would be likely to cause detriment to the providers of the information.

#### Public interest defence

129. In the Commissioner's view disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential, i.e. that there is a public interest defence for a breach of confidence.
130. The Commissioner recognises that the test to be applied in deciding if a duty of confidence can be overridden differs from the public interest normally applied under the Act – in particular that the burden of proof is reversed. The test applied in respect of the duty of confidence assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
131. In light of this approach, it is important to consider the consequences of disclosing confidential information in order to properly weigh the public interest in preserving the confidence against the public interest in disclosure.
132. The complainant has argued that there is a public interest in disclosure. However, he has not provided any further arguments as to the public interest in favour of the disclosure of this information.
133. As noted at paragraph 100 above, the Commissioner recognises that there is a public interest in openness and accountability. In the particular circumstances of the case, the Commissioner also notes that there is a public interest in increasing public understanding in how the export licensing process works. In addition to this, he also believes that there is a public interest in increasing public knowledge of the activities of UK companies in relation to trading with a country which has had international economic and financial sanctions placed on it.
134. However, and as noted at paragraph 103 above, the Commissioner notes that the ECO already publishes some information which includes

statistical information on the numbers of licences granted and refused.<sup>13</sup> Whilst the Commissioner acknowledges that this published information does not include details of the proposed exports, he believes that it does go some way to satisfying this public interest factor.

135. On the other hand, the Commissioner recognises the wider public interest in preserving the principle of confidentiality, and he is mindful of the views of the Tribunal in *Bluck v ICO & Epsom and St Helier University Hospital NHS Trust* [EA/2006/0090] where it quoted from *Attorney General v Guardian Newspapers [1990] 1AC109*, stating that,

*"...as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence..."*<sup>14</sup>

136. In relation to the information in question in this case the Commissioner is satisfied that there is a strong public interest in the export licence application process operating effectively and ensuring that exporters who are subject to export controls properly cooperate and engage with BIS. Were the confidentiality obligations to be disregarded this would serve to undermine this process.

137. Specific arguments against the disclosure of this information, and how the disclosure of this information would be detrimental, are set out at paragraphs 124 to 128 above. The Commissioner has given these arguments weight. In particular, he accepts that there is a public interest in avoiding detriment to the commercial interests of the confiders.

138. Having considered the nature of the withheld information, and the arguments put forward by the complainant and BIS, the Commissioner has concluded that the public interest in maintaining a duty of confidence outweighs the public interest in disclosure in this case. Therefore the Commissioner is satisfied that BIS would not have a public interest defence for breaching its duty of confidence in this case. Therefore the Commissioner is satisfied that information that falls under the scope of request (3) is exempt from disclosure under section 41(1) of the Act.

139. As the Commissioner has found that the information that it holds in relation to request (3) is exempt under section 41(1), he has not gone on to consider BIS' application of sections 40(2) and 43(2).

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<sup>13</sup> <http://www.fco.gov.uk/resources/en/pdf/about-us/our-publications/sec-annual-report-2010>; <https://www.exportcontroldb.berr.gov.uk/eng/fox>

<sup>14</sup> EA/2006/0090, para 8.

## Procedural Requirements

140. Section 1(1) states that any person making a request for information to a public authority is entitled –

- (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.

141. Section 10(1) states that:

*“Subject to subsections (2) and (3), 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.”*

142. As the Commissioner has decided that some of the withheld information is not exempt from disclosure under the exemptions cited by BIS, this information should have been provided to the complainant in line with the duty at section 1(1)(b). Therefore BIS’ failure to do so constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request BIS also breached section 10(1).

143. The Commissioner has also considered whether BIS has complied with its obligations under section 17(1).

144. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice which,

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

145. The Commissioner notes that BIS did not fully specify, in either the refusal notice or the internal review, which parts of section 36 it was seeking to rely upon. In failing to do this, BIS did not comply with the requirements of section 17(1)(b).

146. In addition to this, during the course of the investigation BIS sought to rely upon section 27(2) to withhold some of the information that fell under request (2). However, it did not cite this exemption in the refusal notice or the internal review in relation to this request. For this reason BIS did not comply with the requirements of section 17(1).

147. The Commissioner has also considered whether BIS has complied with its obligations under section 17(3).
148. As noted above, section 10(1) of the Act 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. However, section 17(2) provides that a public authority may extend the time limit where it is still considering the public interest after 20 working days, as long as certain measures are taken. Where any additional time beyond the initial 20 working days is required, the public authority must still serve a 'refusal notice' under section 17 of the Act within 20 working days of a request even in those cases where it is relying on a qualified exemption and has not yet completed the public interest test; state the exemption(s) being relied on and, if not apparent, the reasons why they apply; and give an estimate of the time by which the final decision will be reached.
149. If the final decision is to withhold the requested information, a second notice must then be issued providing the reasons for the decision on the public interest. Under the terms of section 10(3) of the Act, this second notice need not be issued *'until such time as is reasonable in the circumstances'*. As the Commissioner has explained in his *'Good Practice Guidance 4'*, public authorities should aim to conduct the public interest test within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but in the Commissioner's view the total time taken should in no case exceed 40 working days.
150. In this case, the request was made on 9 September 2009. BIS acknowledged the request on 7 October 2009 and stated that it required additional time in order to consider the public interest test in relation to section 43. It informed the complainant that it intended to respond by 4 November 2009. In the event it actually provided its explanation of the public interest test on 17 November 2009, 49 working days later.
151. The Commissioner considers that the 49 working days which BIS took to deal with the matter was not a reasonable timescale. He takes the view that BIS therefore breached section 17(3) of the Act, which provides that a public authority which is relying on a claim that the public interest in maintaining the exemption outweighs the public interest in disclosing the information must:

*"...either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming –*

- (a) *that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information...*"

152. Finally, the Commissioner notes that when BIS wrote to the complainant on 7 October 2009 and informed him that it required further time in order to consider the public interest test, it only stated that it was considering the application of sections 40 and 43. It did not, at this stage, inform the complainant that it was also relying upon sections 27(1)(a), 27(1)(b), 27(1)(d), 36(2)(a), 36(2)(b), and 41(1). In failing to inform the complainant that it was relying upon these additional exemptions within twenty working days, BIS failed to comply with the requirements of section 17(1).

153. The full texts of sections 1, 10 and 17 can be found in the Legal Annex at the end of this notice.

## The Decision

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154. The Commissioner's decision is that BIS dealt with the request in accordance with the requirements of the Act in that:

- it correctly withheld the information that it holds that falls under request (2) under section 27(1)(a), and
- it correctly withheld the information that it holds that falls under request (3) under section 41(1).

155. However, the Commissioner has also decided that BIS did not deal with the request in accordance with the Act in that it incorrectly relied upon sections 41(1) and 43(2) in order to withhold the information that it holds that falls under request (1).

156. In addition to this, the Commissioner also decided that BIS failed to meet the requirements of sections 10 and 17.

## Steps Required

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157. The Commissioner requires BIS to take the following steps to ensure compliance with the Act:

- BIS should disclose the information that it holds that falls under request (1).

158. BIS must take the steps required by this notice within 35 calendar days of the date of this notice.

### **Failure to comply**

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159. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### **Other matters**

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160. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.



## Right of Appeal

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161. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

162. 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.

163. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 17<sup>th</sup> day of January 2011**

**Signed .....**

**Graham Smith  
Deputy Commissioner  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### Section 1

- (1) Any person making a request for information to a public authority is entitled –
  - (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.
- (2) Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) Where a public authority –
  - (a) reasonably requires further information in order to identify and locate the information requested, and
  - (b) has informed the applicant of that requirement,the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
- (4) The information –
  - (a) in respect of which the applicant is to be informed under subsection (1)(a), or
  - (b) which is to be communicated under subsection (1)(b),is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

- (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

## Section 10

- (1) Subject to subsections (2) and (3), 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.
- (2) Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.
- (3) If, and to the extent that –
- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
  - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

- (4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.
- (5) Regulations under subsection (4) may –
- (a) prescribe different days in relation to different cases, and
  - (b) confer a discretion on the Commissioner.
- (6) In this section –
- the date of receipt” means –
- (a) the day on which the public authority receives the request for information, or

- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

## Section 17

- (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -
  - (a) states that fact,
  - (b) specifies the exemption in question, and
  - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (2) Where—
  - (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
    - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
    - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
  - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

- (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a

separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
  - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where –
- (a) the public authority is relying on a claim that section 14 applies,
  - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
  - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under section (1), (3) or (5) must –
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
  - (b) contain particulars of the right conferred by section 50.

### **Section 23**

- (1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

- (2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.
- (3) The bodies referred to in subsections (1) and (2) are-
  - (a) the Security Service,
  - (b) the Secret Intelligence Service,
  - (c) the Government Communications Headquarters,
  - (d) the special forces,
  - (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
  - (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
  - (g) the Tribunal established under section 5 of the Security Service Act 1989,
  - (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
  - (i) the Security Vetting Appeals Panel,
  - (j) the Security Commission,
  - (k) the National Criminal Intelligence Service, and
  - (l) the Service Authority for the National Criminal Intelligence Service.
- (4) In subsection (3)(c) "the Government Communications Headquarters" includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.
- (5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

## **Section 24**

- (1) 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.
- (2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
- (3) A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.
- (4) A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.

## **Section 27**

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
  - (a) relations between the United Kingdom and any other State,
  - (b) relations between the United Kingdom and any international organisation or international court,
  - (c) the interests of the United Kingdom abroad, or
  - (d) the promotion or protection by the United Kingdom of its interests abroad.
- (2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.
- (3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.
- (4) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)-
  - (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or

- (b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

- (5) In this section-

"international court" means any international court which is not an international organisation and which is established-

- (a) by a resolution of an international organisation of which the United Kingdom is a member, or
- (b) by an international agreement to which the United Kingdom is a party;

"international organisation" means any international organisation whose members include any two or more States, or any organ of such an organisation;

"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.

### **Section 36**

- (1) This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

- (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,



- (b) would, or would be likely to, inhibit-
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
- (3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).
- (4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".
- (5) In subsections (2) and (3) "qualified person"-
  - (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
  - (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
  - (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
  - (d) in relation to information held by the House of Commons, means the Speaker of that House,
  - (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
  - (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
  - (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
  - (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-

- (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
  - (i) a Minister of the Crown,
  - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
  - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.
- (6) Any authorisation for the purposes of this section-
  - (a) may relate to a specified person or to persons falling within a specified class,
  - (b) may be general or limited to particular classes of case, and

- (c) may be granted subject to conditions.
- (7) A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-
  - (a) disclosure of information held by either House of Parliament, or
  - (b) compliance with section 1(1)(a) by either House,would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

## Section 40

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if-
  - (a) it constitutes personal data which do not fall within subsection (1), and
  - (b) either the first or the second condition below is satisfied.
- (3) The first condition is-
  - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
    - (i) any of the data protection principles, or
    - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
  - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

- (5) The duty to confirm or deny-
- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
  - (b) does not arise in relation to other information if or to the extent that either-
    - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
    - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
- (6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

- (7) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

## **Section 41**

- (1) 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.
- (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with

section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

### **Section 43**

- (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).