

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

15<sup>th</sup> December 2008

**Public Authority:** Department for Business, Enterprise and Regulatory Reform  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

### Summary

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The complainant wrote to the Department for Business, Enterprise and Regulatory Reform to request information regarding export licence applications made by a named company. The public authority refused to disclose the specific details of the export licence applications by relying on section 41 of the Act. The Commissioner has examined the withheld information and has found that it was provided to the public authority in confidence and that therefore the section 41 exemption is engaged. The complainant also requested details of a director of this company and the Commissioner found that the public authority correctly withheld this information under section 40(2) of the Act. However the Commissioner found that the public authority breached section 10(1) and section 17(1)(c) of the Act in its handling of the complainant's request.

### 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.

### The Request

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2. On 15 May 2007 the complainant wrote to the public authority to request details of export licences granted to the company 'EDO MBM Technology Ltd' which the complainant described as a Brighton, UK based subsidiary of the EDO Corporation. The complainant said that he was particularly interested in export licences relating to a military aircraft component called the Zero Retention Force Arming Unit ("ZRFAU") and said that he wanted access to export licences relating to this component's export from EDO MBM Technology Ltd and/or EDO (UK) Ltd and/or MBM Technology Ltd to either the USA or to Israel.

3. The complaint alleged that in a recent court case one of the directors of the named company had stated that the information he wanted was readily available and could be obtained from the public authority.
4. The public authority responded to the request on 22 June 2007. First of all it stated that export licence applications are made to the government in confidence and that therefore the information they contain is exempt from disclosure under section 41(1) of the Act (Information provided in confidence). Furthermore, it said that under section 41(2) of the Act it could neither confirm nor deny whether any export licence was applied for by any specific company because to do so would breach that confidentiality.
5. However, the public authority said that, given the specific circumstances of the case, and as an exception to its usual practice, it had contacted the exporter to seek its permission to release details of export licences applied for. It explained that EDO MBM Technology had authorised the release of any information specific to an export licence for the ZRFAU to MBM Technology Ltd and EDO MBM Technology Ltd between 2000 and the present day. It explained that MBM Technology Ltd had changed its name to EDO MBM Technology Ltd in July 2003.
6. It confirmed that one export licence had been granted to EDO MBM Technology Ltd for the export of two ZRFAU's to a sister company in the USA. It said that no export licences applications have been made in respect of EDO (UK) Ltd for the export of this component to Israel or the USA.
7. The complainant was dissatisfied with the response he had received and wrote back to the public authority on 25 June 2007. He asked why he had not been provided with a copy of the actual export licence which the public authority confirmed had been granted to EDO MBM Technology Ltd. The complainant also suggested that his request had been interpreted too narrowly and explained that it should have been read as a request for information relating to *all* exports from the companies he referred to, to Israel and the USA between 2000 and 2007.
8. The complainant said again that one of the directors of EDO (UK) Ltd had made a statement in a recent court case to the effect that information regarding its export applications was available from the public authority. In light of this the complainant said that he did not see how the public authority could claim that the information would be covered by the section 41 exemption. The complainant said that the director's statement referred to all export licence information relating to the companies he referred to rather than just the ZRFAU.
9. The public authority responded to the complainant again in a letter dated 5 July 2007. It said that it had released the details of the single ZRFAU export application after it had sought the permission of the exporter. It explained that in response to its approach, EDO MBM Technology Ltd had authorised the release of information only, and specific to any export licences for ZRFAU's to MBM Technology Ltd, between 2000 to June 2003 and to EDO MBM Technology from July 2003 to present. It said that given this authorisation it had reviewed the documentation it held and had identified the key elements, the destination of the export, the end user and the purpose of the export, which it reasoned would

enable the complainant to gain a reasonable understanding of the transaction. It said that to go beyond this and release further information or the full application form itself would be contrary to the authorisation it had received from the exporter and therefore would breach section 41 of the Act.

10. The public authority also commented on the complainant's claim that one of the directors of EDO (UK) Ltd had said in Court that details of its export applications were available from the public authority's website. It said that it appeared that the individual involved had reflected his understanding of how export licence information was reported but that his understanding was incorrect. It explained to the complainant that it produced an annual report detailing the export licence applications that had been granted or refused during the year but information was presented in amalgamated form, by destination, which did not allow the exporter or the end user to be identified.
11. The complainant subsequently spoke with the public authority on the telephone and it confirmed that, beyond the example already mentioned, there were no other export licences granted for the ZRFAU component to either Israel or the USA for any of the companies the complainant referred to. It was suggested that if the complainant required further information then he should make a request in writing and the public authority would either deal with it as a new freedom of information request or an internal review of the previous request.
12. The complainant wrote to the public authority on 16 July 2007. The complainant made the following 5 points and said that he would leave it for the public authority to decide whether to address each point as a new freedom of information request or as a request for internal review:
  - i). The complainant requested the name of the director of EDO MBM Technology Ltd who had authorised the earlier disclosure of information in the public authority's response of 22 June 2007.
  - ii). The complainant requested details of export licences granted or refused to MBM Technology Ltd, EDO (UK) Ltd, EDO MBM Technology Ltd, EDO Rugged Systems Ltd, EDO Flexible Systems Ltd, for the ZRFAU component for export to any country as an end user, or via any other country or countries, to any other country as an end user.
  - iii). The complainant also requested details of export licences granted or refused to MBM Technology Ltd, EDO (UK) Ltd, EDO MBM Technology Ltd, EDO Rugged Systems Ltd, EDO Flexible Systems Ltd, for another component referred to as "ERU-151" to any country as an end user and, or via any other country or countries.
  - iv). The complainant asked for an internal review of his initial request for details of all export licences granted to the named companies to Israel or the USA. He said he clarified this request as meaning a request for details of both direct exports and via third party countries.

- v). Finally, the complainant provided his arguments on why disclosure of the information would be in the public interest. He also provided further background information on legal proceedings involving EDO MBM Technology Ltd which were related to his freedom of information requests.
13. The public authority acknowledged the complainant's request on 23 July 2007. Whilst it appears that some of the information requested by the complainant was in fact captured by the earlier request, the public authority said that it would treat the first 3 points of the request as a new freedom of information request and the fourth point as a request for internal review. It said that the fifth point raised legal issues which it saw as the essence of the complainant's freedom of information requests and it said that it would deal with it in this context. It noted that the complainant had referred to public interest considerations and said that it would take this in to account when considering whether disclosure of the requested information would constitute an actionable breach of confidence.
  14. The public authority provided its response to the first three parts of the request on 9 August 2007. It said that in respect of part i) of the request, the information was being withheld under section 40(2) of the Act which provides for an exemption for personal information. In respect of parts ii) and iii) of the request it said that export licence applications are made to the government in confidence and as such the information they contain is exempt from disclosure under section 41(1). Furthermore, it said that, pursuant to section 41(2) it could neither confirm nor deny whether any export licence was applied for by any specific company because to do so would breach that confidentiality.
  15. On 10 August 2007 the complainant requested an internal review of the response to his request.
  16. On 19 September 2007 the public authority presented the findings of its internal review. It explained that it was conducting an internal review of the first request of 15 May 2007 and the second request of 16 July 2007 together as one response. In respect of the first request it said that, other than the information it had provided regarding the export of the ZRFAU, it upheld the decision that the information requested was exempt from disclosure under section 41.
  17. In respect of part i) of the second request, it said that it was upholding the decision to refuse to disclose the names of the directors on the grounds that the information was exempt under section 40 and disclosure would "breach the data protection principles". In respect of parts ii) and iii) of this request the public authority said that it was upholding the decision that this information was exempt under section 41 since it was provided to the Government in confidence.

## The Investigation

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### Scope of the case

18. On 9 October 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's application of section 41 of the Act which he argued had been applied inappropriately.

### Chronology

19. The Commissioner wrote to the public authority on 30 April 2008. He outlined the details of the complaint and asked the public authority to clarify its position in respect of its application of section 41. The Commissioner said that whilst the public authority had initially refused to confirm or deny whether it held information requested by the complainant it appeared to him that it had changed its position and was now confirming that it did hold information falling within the scope of the complainant's request. The Commissioner asked the public authority to confirm that his understanding was correct and, assuming that it was, asked it to provide him with copies of the information it had withheld.
20. The Commissioner also asked the public authority to address the following points:
- The Commissioner asked the public authority to confirm whether any of the requested information had previously been disclosed or otherwise placed in the public domain.
  - The Commissioner asked the public authority to provide him with its comments on what detriment would, in its opinion, be caused to the person(s) who provided the information were it to be disclosed to the complainant.
  - The Commissioner asked whether the public authority had considered if there was a public interest in disclosing the information.
21. The Commissioner noted that the public authority had refused to disclose the information requested by the complainant in part i) of his request of 16 July 2007 under section 40 of the Act because it said disclosure would "breach the data protection principles". The Commissioner asked the public authority which data protection principle it believed would be breached through disclosure.
22. The public authority wrote to the Commissioner on 30 May 2008 and said that it was confirming that it held information on export licence applications for the named companies. In response to the Commissioner's questions the public authority said that to its knowledge none of the requested information had been previously disclosed. It also said that it did not think that it was its responsibility to suggest reasons why the information should be disclosed and its confidentiality obligations disregarded. Similarly, it said that it did not think that the question of what detriment would be caused to the provider of the information was relevant to the consideration of the section 41 exemption. Nevertheless it provided the

Commissioner with its reasons for withholding information on export applications and in doing so did suggest some examples of the detriment that could be caused to the provider of the information as a result of disclosure.

23. The public authority explained that it already published information on export licence applications including the number of licences issued for Israel and the USA and the types of equipment covered. It said that it also published specific figures for “incorporation” cases. It explained that this is where components are exported to one place to be incorporated into equipment destined for somewhere else. However, it said that it does not publish details of who exported what to whom for the following reasons which are worth quoting in their entirety:
- Competitors could use information of this kind – which could reveal a considerable amount of information about the relevant exporter’s products and markets – to target the exporter’s customers in future tenders and therefore put them at a competitive disadvantage.
  - If the specific end users were identified, this would also reveal the details of the procurement activities of the end user. This could reveal details of the end user’s military capacity or indeed current lack thereof. It could reveal whether or not a particular type of equipment is being used by a particular force in a particular location – which could be of strategic assistance to the end user’s adversaries. It could also reveal the state of readiness or otherwise of the end user’s armed forces. Naturally this is very sensitive information.
  - In incorporation cases (see above), there may be technical or commercial sensitivity about the association of the components with the finished article.
  - The information could be used by individuals/groups to target the relevant exporter because they do not agree with its activities, even though they are perfectly legal. A pressure group has already been involved in direct action at the company’s premises.
24. The public authority also confirmed which data protection principle it believed would be breached through the disclosure of the name or names of the director(s) who had authorised the initial disclosure of information regarding the single ZRFAU export application. It said that relevant data protection principle was the first principle. The first principle requires that personal data shall be processed fairly and lawfully and in particular shall not be processed unless one of the conditions in schedule 2 of the Data Protection Act 1998 is met and it said that it thought that the only schedule 2 condition that might be relevant is the 6th condition.
25. The Commissioner subsequently asked the public authority to clarify for which elements of the complainant’s request it was confirming it held information.
26. The public authority responded to the Commissioner on 19 August 2008. At this point it confirmed that, to the best of its knowledge, the single ZRFAU application which it referred to in its letter of 22 June 2007 was the only application it held for this component from any of the named companies. It also said that it could



confirm that it held information falling within the scope of part iii) of the request of 16 July 2007 for details of applications for the ERU-151 component.

## Findings of fact

27. The Government publishes details of exports of controlled goods in its annual and quarterly reports on United Kingdom Strategic Export Controls. This information includes the number and total value of exports to individual countries and a description of the type of goods being exported. This information is available on the Foreign and Commonwealth office's website at the internet address below:

<http://www.fco.gov.uk/en/about-the-fco/publications/publications/annual-reports/export-controls1>

28. The government does not publish details of the individual exports and does not comment on whether a particular licence has been applied for by a particular exporter.
29. EDO MBM Technology Ltd, a Brighton based Aerospace Engineering Company, has been the subject of a campaign by local pressure groups who alleged that it had supplied Israel with military aircraft components. As a result of this campaign several members of the pressure group were prosecuted and convicted of aggravated trespass.

## Analysis

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30. A full text of the provisions referred to in this section is contained within the legal annex.

## Procedural breaches

31. The public authority had initially refused to confirm or deny whether it held information falling within the scope of parts ii) and iii) of the request of 16 July 2007. However at the internal review stage it appeared, although it was not altogether clear, that the public authority had revised its position and had now confirmed that it held information falling within the scope of these parts of the request. During the course of his investigation the Commissioner asked the public authority to clarify its position and the public authority said that it was prepared to confirm that it held information falling within the scope of parts ii) and iii) of the request. Therefore by failing to confirm to the complainant that it held information falling within the scope of the request within 20 working days, the public authority breached section 10(1) of the Act.
32. The public authority only explained which data protection principle would be breached through disclosure when it responded to the Commissioner's enquiries on 30 May 2008. By failing to properly explain why section 40(2) of the Act prevented disclosure of the information requested in part i) of the request of 16 July 2007 the public authority breached section 17(1)(c).

## Exemption

### Section 41 – Information provided in confidence

33. The public authority has now confirmed that it holds information falling within the scope of the complainant's request but, with the exception of the single ZRFAU application referred to in the public authority's initial response, has refused to disclose details of the export applications by relying on section 41 of the Act. For the single ZRFAU application the public authority refused to supply full details and refused to disclose the export application form under section 41 of the Act.
34. Section 41 provides for an exemption for information provided in confidence. However, section 41 will only apply if the information has been obtained by the public authority from another person and disclosure would constitute an actionable breach of confidence.
35. The Commissioner has reviewed the information provided by the public authority which includes all export licence applications for the named companies for the years 2000 to 2007. The public authority said that in providing the information to the Commissioner it had interpreted the complaint widely and for each export application there was a file of documents which typically included the following documentation:
- Export licence application form – full details of the goods which are to be exported; full details of the exporter and the consignee; number and value of goods to be exported.
  - Export Licence – same as above plus details of the length of the licence and conditions of the licence.
  - Goods Items Report – details of the goods.
  - End user undertaking – a declaration of what the goods will be used for; details of exporter and the consignee.
  - File notes – administrative details of the file's movements and the application process.
  - Copy letters and supporting correspondence – covering letters for the application.
36. Having reviewed the withheld information the Commissioner finds that all of the information that is material to the application process was provided by the exporter which includes the application form, the good items report and the end user undertaking. Therefore the Commissioner is satisfied that the first element of the section 41 exemption has been met as this information was obtained from another person. The Commissioner wishes to stress that in this context "person" includes both natural persons and legal entities such as companies.



37. Some of the information such as the export licence certificate will have been generated by the public authority itself and will therefore not have been “obtained from another person”. However, whilst the actual document will not have been physically obtained from another person, it is clear that any information contained within the document which is material to the application, such as details of the exporter, the consignee and the goods were, and could only ever have been, provided by the exporter in the course of its application. In considering whether section 41 applies it is therefore important not to confuse the information that is being imparted with the form in which that information is recorded.
38. Some information included within the export licence certificate, such as the start and end date of the export licence, will not have been provided by the exporter and will in fact have been provided by the public authority to the exporter at the end of the application process. However, information such as the duration of an export licence when in isolation will not reveal anything about export licence applications for the named companies. It is only when it is combined with additional information such as details of the goods being exported, the name of the exporter and the name of the end user that it becomes information about export licence applications for the named companies. The Commissioner is therefore satisfied that all of the withheld information that is material to an export licence application was obtained from another person, pursuant to section 41(1)(a) of the Act.
39. Information obtained from another person will only engage the section 41 exemption if disclosure of that information would constitute a breach of confidence actionable by that or any other person. The test for a breach of confidence is set out in the case of *Coco v Clark*<sup>1</sup>. Under this test a breach of confidence will be actionable if:
- The information has the necessary quality of confidence;
  - The information was imparted in circumstances importing an obligation of confidence; and
  - There was an unauthorised use of the information to the detriment of the confider.

### **Necessary quality of confidence**

40. The Commissioner has reviewed the withheld information and has carefully considered whether it had the necessary quality of confidence at the time the complainant made his request. Information will have the necessary quality of confidence if it is not otherwise accessible or if it is more than trivial.
41. The Commissioner has found that whilst details of strategic exports are available in the government’s annual and quarterly reports on strategic exports, the specific information relating to EDO MBM Technology Ltd and the other named companies is not otherwise accessible.

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<sup>1</sup> *Coco v AN Clark (Engineers) Ltd* 1969 RPC 41

42. It is generally accepted that, as the law does not concern itself with trivialities, information which is trivial will not have the necessary quality confidence. The Commissioner is satisfied that in this case the withheld information is not trivial as it reveals significant commercial information about the named companies' products and their markets.

### Obligation of confidence

43. The Commissioner has gone onto consider whether the information was imparted in circumstances giving rise to an obligation of confidence. Whilst the public authority has said that information regarding export licences is provided to the government in confidence, it has not explained why the exporter would have believed that the information it was providing would remain confidential and the Commissioner is not aware of any explicit undertaking of confidentiality given by the public authority at the time the information was provided.
44. The complainant has alleged that a director of EDO (UK) Ltd had said in court that information regarding its export licences was readily available from the public authority. However, the public authority subsequently explained that this is not the case and said that it appeared that this director's understanding was inaccurate. Assuming that what the complainant has said is correct, the Commissioner has considered whether this would undermine the public authority's position that the information was imparted in circumstances giving rise to an obligation of confidence. The Commissioner has concluded that this position is not undermined because even if a director of one of the named companies said in court, apparently mistakenly, that he believed that information was publicly available, it does not necessarily follow that the company *expected* that this information would be made available. The director may have noted that information on export licence applications was available from the public authority but this does not mean that when this information was provided to the public authority the company did not expect that the information would remain confidential.
45. The Commissioner notes that when contacted by the public authority in response to the first request EDO MBM Technology said that it was only prepared to release limited information relating to the single ZRFAU export application and asked that no further information regarding this application or any other application be disclosed. The Commissioner believes that this is a fair indication of the expectation of EDO MBM Technology Ltd and the other named companies at the time the information was provided.
46. In the case of *Coco v Clark* 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."*

47. Having applied the 'reasonable person' test the Commissioner is satisfied that it would be reasonable for EDO MBM Technology Ltd and the other named companies to expect - given that they would no doubt be aware that only limited and general information is published by the government - that specific information on their licence application would not be disclosed. Furthermore, the Commissioner understands that the withheld information is of commercial value in what is a strongly competitive international market and believes that the named companies would have supplied it to the public authority in the expectation that the information would only be used to process the relevant export application. Therefore the Commissioner has found that the specific information on export licences was provided to the public authority in circumstances that gave rise to an implied obligation of confidence.

### **Detriment to the confider**

48. The Commissioner, having considered the examples given at paragraph 23, accepts that were the information disclosed it would compromise the commercial interests of EDO MBM Technology Ltd and the other named companies and may put them at a competitive disadvantage. The Commissioner notes that the second example given by the public authority relates to the detriment that could be caused to the end user rather than the named companies. However the Commissioner is of the view that if a detriment of this kind would be caused to the end user then a detriment would also be caused to the named companies as it would damage their commercial relationships.
49. The Commissioner is therefore satisfied that a detriment would be caused to the provider of the information were that information to be disclosed.

### **A public interest defence?**

50. The Commissioner has found that all three elements of the test of confidence have been met. However it is necessary to consider whether there may be a public interest defence before the Commissioner can decide whether section 41 of the Act applies.
51. Section 41 is an absolute exemption and therefore there is no public interest test under the Act to apply. However, under the common law of confidence there is a public interest defence to a claim of breach of confidence. The Information Tribunal described the effect of this in the case of *S v The Information Commissioner and the General Register Office*:
- "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."*<sup>2</sup>
52. The Commissioner recognises that the test to be applied in deciding if a duty of confidence can be overridden differs from the public interest test normally applied

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<sup>2</sup> S v The Information Commissioner and the General Register Office [EA/2006/0030]

under the Act, in particular that the burden of proof is reversed. The public interest test normally applied under the Act assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure. 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.

53. 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.
54. The complainant has argued that disclosure of the information would serve the public interest as it would cast light on the testimony given by the director of EDO MBM (UK) Ltd in a recent court case in stating that his company did not export goods to Israel. In addition, the Commissioner considers that there is a more general public interest in the transparency of export licence arrangements especially with regard to the export of military goods.
55. On the other hand, the Commissioner recognises the wider public interest in preserving the principle of confidentiality, especially in the circumstances of this case. He believes 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 co-operate and engage with the department. Were the confidentiality obligations to be disregarded this would serve to undermine this process. Specific arguments against disclosure in export licence cases – as set out in paragraph 23 above – also raise public interest issues and the Commissioner has given them weight. The Commissioner also believes that there is a public interest in avoiding the detriment to the commercial interest of the confider, EDO MBM Technology Ltd and the other named companies.
56. Having reviewed the withheld information and the arguments put forward by the complainant and the public authority, the Commissioner has concluded that there is a strong public interest in maintaining the obligation of confidence. The Commissioner has reached the view that the public interest in maintaining a duty of confidence outweighs the public interest in disclosure in this case. Consequently the Commissioner has concluded that a public interest defence could not be established in this case. Accordingly, his conclusion is that the information on specific export licences applied for by EDO MBM Technology Ltd and the other named companies is exempt from disclosure under section 41 of the Act.

#### **Section 40 – Personal information**

57. The Commissioner has also withheld part i) of the complainant's request of 16 July 2007; for the name of the director of EDO MBM Technology Ltd who had authorised the earlier disclosure of information in the public authority's response of 22 June 2007. The public authority explained that the information constituted personal data and therefore was being withheld under section 40(2) of the Act.

58. Under section 40(2) information will be exempt if it constitutes the personal data of someone other than the person making the request and its disclosure would contravene any of the data protection principles set out in schedule 1 of the Data Protection Act 1998.

### **Is the information personal data?**

59. In order for this exemption to be engaged it is first necessary to establish if the information constitutes personal data. Personal data is defined in the Data Protection Act 1998 as

*“data which relate to a living individual who can be identified from those data or from those data and any other information in the possession of, or likely to come in to the possession of, the data controller.”*

In this case the data controller is the public authority.

60. The Commissioner is satisfied that the name of the director who authorised disclosure, given that it clearly relates to a living individual, is personal data. However for the section 40(2) exemption to apply the public authority would need to show that disclosure would contravene the data protection principles as set out in the Data Protection Act 1998.

### **The first data protection principle**

61. The public authority has said that it believes that disclosure would contravene the first data protection principle. The first data protection principle provides that:

*“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-*

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.*

62. The Commissioner agrees that it is the first data protection principle that is relevant in this case.

63. The public authority has argued that processing the personal data of the director who authorised the earlier disclosure of information relating to the ZRFAU component, through disclosure of his or her name to the complainant, would be unfair. In corresponding with the Commissioner the public authority has highlighted that EDO MBM Technology has been targeted by pressure groups as a result of its perceived role in exporting military aircraft components to Israel.

64. In *Awareness Guidance 1* the Commissioner suggested factors that may be relevant when considering the concept of fairness.<sup>3</sup> In this case the Commissioner has given consideration to the following:
- Does the individual have an expectation that their personal data would not be released?
  - Would processing cause any unnecessary or unjustified distress?
65. The Commissioner believes that the director would have a reasonable expectation that when they authorised the disclosure of the limited information regarding the ZRFAU component that further information including their name would not be disclosed. Whilst the complainant had requested the names of the director who authorised the earlier disclosure of information, it follows that in disclosing this information the public authority would also be revealing the identity of the director who had requested that the public authority disclose no further information to the complainant. Given the fact that EDO MBM Technology had been targeted by local pressure groups the Commissioner believes that it would not be unreasonable for this individual to expect that their identity would not be revealed. In the circumstances, the Commissioner considers that it would be unfair to focus any additional attention on the company director who authorised disclosure of some limited information.
66. The Commissioner has also gone on to consider whether disclosure would meet one of the conditions in schedule 2 of the Data Protection 1998.

### Schedule 2 – Condition 6

67. The public authority has suggested that, in respect of schedule 2, condition 6 is the only condition relevant to the complainant's request and the Commissioner is minded to agree. Condition 6 legitimises the fair and lawful processing of non-sensitive personal data in cases where:

*“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or third parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”*

68. In deciding whether condition 6 would be met in this case the Commissioner has considered the decision of the Information Tribunal in *House of Commons v Information Commissioner & Leapman, Brooke, Thomas*.<sup>4</sup> In that case the Tribunal established the following three part test that must be satisfied before the sixth condition will be met:
- there must be legitimate interests in disclosing the information,

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<sup>3</sup>[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/personal\\_information.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf)

<sup>4</sup> House of Commons v Information Commissioner & Leapman, Brooke, Thomas (EA/2007/0060)



- the disclosure must be necessary for a legitimate interest of the public and,
  - even where disclosure is necessary it nevertheless must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.
69. The Commissioner does accept that there is a legitimate interest in ensuring the conduct and integrity of the licensing process. However, he does not believe that disclosure of the name of a company director who authorised the disclosure of some limited information regarding a licence application would shed any light on this issue. Consequently the Commissioner has found that disclosure of the name of the director is not necessary for the legitimate interests of the complainant. In light of this the Commissioner has not gone on to consider the final element of the test.
70. The Commissioner is satisfied that the name of the director who authorised the earlier disclosure of information related to the ZRFAU application is therefore exempt from disclosure under section 40(2) of the Act.

## The Decision

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71. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The public authority correctly withheld information relating to export licence applications made by EDO MBM Technology Ltd and the other named companies, under section 41(1) of the Act.
  - The public authority correctly withheld the names of the director who had authorised the earlier disclosure of information regarding the ZFRAU application, under section 40(2) of the Act.
72. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority breached section 10(1) of the Act by failing to confirm or deny whether it held information falling within the scope of parts ii), iii) and iv) of the request of 16 July 2007 within 20 working days of receiving the request.
  - The public authority breached section 17(1)(c) by failing to properly explain why section 40(2) of the Act prevented disclosure of the information in part i) of the request of 16 July 2007.

## Steps Required

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73. The Commissioner requires no steps to be taken.

## Right of Appeal

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74. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
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Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 15<sup>th</sup> day of December 2008**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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

## Legal Annex

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### **Section 1(1)** provides 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.”

### **Section 10(1)** provides 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.”

### **Section 17(1)** provides that –

“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.”

### **Section 40(2)** provides that –

“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.”

**Section 40(3)** provides that –

“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.”

**Section 41(1)** provides that –

“Information is exempt information if-

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

**Section 41(2)** provides that –

“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.”