

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 6 January 2014

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

### Decision (including any steps ordered)

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1. The complainant has requested information on the UK companies who applied for and were granted licences for the export of equipment to the Bahrain government. The Department for Business, Innovation and Skills (DBIS) provided the names of the companies and a description of the equipment listed on the licences but considered the information in the format requested was exempt from disclosure by virtue of section 41 and 43 of the FOIA.
2. The Commissioner's decision is that DBIS has correctly applied the section 41 exemption to the withheld information and the public interest favours maintaining the exemption.

### Request and response

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3. On 22 February 2013, the complainant wrote to DBIS and requested information in the following terms:

*"Please can you provide me with the names of companies that have applied for and were granted licences for the export of equipment with ML1, ML2 and/or ML3 ratings during 2009/2010. Please can you also let me know if a particular licence was granted what equipment they supplied to Bahrain government during this period."*

4. DBIS responded on 14 March 2013. It stated that it held information within the scope of the request and explained that it was providing a list of the names of companies who had applied for licences to export equipment to any end-user in Bahrain, not just government, in 2009,

2010 and 2011. DBIS also provided a table listing information about the licences applied for during 2009 and 2010 including a description of the equipment listed on the licences. This information was not linked to the company names which were provided in a separate list.

5. DBIS considered it could not provide the information in the format requested i.e. the names of companies granted export licences and for what types of equipment as the information was provided in confidence (section 41) and to do so would be likely to prejudice the commercial interests of these companies (section 43).
6. Following an internal review DBIS wrote to the complainant on 7 May 2013. It stated that it considered the substance of the review to be to consider its decision not to disclose which of the companies that applied for export licences were granted them and if they were granted export licences whether they supplied the Bahraini government with weapons.
7. DBIS explained it had intended to supply the information on which companies were granted export licences for export of ML1, ML2 and/or ML3 equipment to Bahrain but did not supply this due to an oversight. This information was supplied to the complainant with the internal review response. On the second point DBIS still considered any information it held on the companies who were granted export licences for export to the Bahrain government to be exempt on the basis of section 41 and section 43.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 27 May 2013 to complain about the way his request for information had been handled.
9. The Commissioner recognises the request was formed of two parts. The first part was for the names of companies that applied for and were granted licences for the export of equipment with ML1, ML2 and/or ML3 ratings to Bahrain. This information was supplied to the complainant and is not being considered as part of the investigation.
10. The second part of the request which is the subject of the Commissioner's investigation is the additional information request relating more specifically to the names of companies granted licences for export to the Bahrain government, the equipment the licence was granted for and whether the equipment was then supplied to the Bahrain government.
11. It is this information which DBIS considers exempt from disclosure on the basis of section 41 and 43 of the FOIA and it is the decision to

withhold this information which forms the basis of the Commissioner's investigation.

## **Reasons for decision**

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### Section 41 – information provided in confidence

12. DBIS has applied section 41(1) to withhold the information which confirms the names of companies who applied for export licences to Bahrain along with details of the proposed export such as type of equipment, whether the export was going to the Bahraini government and if the equipment was then supplied. To be clear, DBIS has provided the names of companies who applied for licences to export to Bahrain and were granted licences for the export of ML1, ML2 and ML3 rated equipment. It is the combination of this information with the information specifically linked to each company on types of equipment and end-user that DBIS considers is subject to the duty of confidence.
13. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

*Was the information obtained from another person?*

14. The names of companies who applied for export licences and the details of the export licences clearly constitutes information sent by a third party (the companies themselves) and the Commissioner therefore accepts the first limb of section 41 is met.

*Would disclosure constitute an actionable breach of confidence?*

15. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
  - Whether the information has the necessary quality of confidence;
  - Whether the information was imparted in circumstances importing an obligation of confidence and
  - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.
16. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.

17. The Export Control Organisation (ECO) is responsible for issuing licences for controlling the export of strategic goods and is part of DBIS. The information in this case was received by the ECO in its role as the body responsible for making licencing decisions in this regard.
18. The Commissioner would therefore accept that the information cannot be said to be publicly available and as such it cannot be considered to be otherwise accessible. DBIS has also argued that the information cannot be said to be trivial as it contains sensitive commercial information such as the fact that companies have applied for export licences to Bahrain and details of the type of the equipment they intended to export as well as to whom.
19. Based on the above the Commissioner agrees that the information is not trivial as it does contain more detailed information than that already provided and links companies to specific export licences which could be considered commercially sensitive information. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.
20. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence. In support of its position, DBIS has explained to the Commissioner how the information is received and the information that is required in order for a decision on a licence to be made.
21. DBIS has explained that under the Export Control Act 2002 there is an order which gives the Secretary of State the power to grant licences. As part of the application process for a licence, applicants have to provide sufficient information for the Secretary of State to be able to make a decision, often including details of the goods to be exported, details of the end-use and final recipient. DBIS has acknowledged that there is no statutory provision which requires this information to be provided as part of the licencing process but it is widely accepted amongst exporters that this information will need to be provided if a licence is to be granted.
22. It is also implicit that the information is supplied in confidence. In 2009/2012 the licence application form did not contain a confidentiality statement but did explicitly set out the circumstances in which information would be shared with other government departments or international organisations.
23. The Commissioner recognises that information provided as part of the licencing application is provided in order to allow the Secretary of State to make a decision on granting export licences and there is an implied obligation of confidence on the part of the ECO that it will not share

information provided as part of this process in circumstances other than those set out on the application form.

24. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. The test under section 41 is whether disclosure would constitute a breach of confidence actionable by the person who provided the information or any other person.
25. In considering this point DBIS contacted all of the companies involved to ask if they consented to disclosure or had any objections. All but one of the companies registered strong objections to disclosure.
26. The Commissioner has reviewed the submissions from the companies and notes the following objections:
  - Disclosure could result in harm to the company, its employees and facilities as it is a supplier of sensitive equipment and anonymity is important to protecting its employees, many of the companies rely on maintaining low profiles as a form of security;
  - Disclosure would result in specific details of the Bahrain government's military procurement being ascertained, above and beyond what is already in the public domain despite confidentiality undertakings existing between the supplier and the government;
  - The Commissioner had previously found, in a request relating to export licences<sup>1</sup> that although details of strategic exports are available, specific information relating to specific named companies is not accessible and it is reasonable for named companies to expect that information which relates to its commercial interests not be disclosed;
  - Disclosure of information about the equipment to be exported linked to specific companies when that information is of a sensitive nature would be likely to be prejudicial to companies' commercial interests; and
  - Several of the companies emphasised the confidentiality inherent in the commercial arrangements it has with its clients, which would be likely to be prejudiced by disclosure.
27. The Commissioner accepts the argument that if the information were disclosed the commercial interests of the named companies would be

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<sup>1</sup> FS50357741

compromised, potentially putting them at a competitive disadvantage and damaging their commercial relationships. The Commissioner is also mindful that the majority of the companies have emphasised the importance of anonymity to ensure their security and, although the names of the companies have already been disclosed, releasing further information into the public domain about the nature of the licences issued to these companies would be likely to result in a detriment to the provider of the information.

*Would a public interest defence be available?*

28. As section 41(1) is an absolute exemption there is no public interest. However, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The duty of confidence public interest test assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.
29. In taking 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. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected and not easily overridden.
30. The complainant has argued that disclosure of the information would serve the public interest as it would increase transparency in an area which the complainant considers is heavily subsidised by the UK government.
31. The Commissioner accepts there is a public interest argument based around transparency of export licences especially with regard to the export of military equipment and arms. In this case DBIS has released some information about the licences granted and the end-users in order to satisfy the public interest in this area but strongly maintains its position that linking the information in the public domain with specific companies would not be in the public interest.
32. DBIS has argued that breaching the duty of confidence it has to applicants applying for export licences would be highly likely to have a detrimental impact on the export licencing system. It considers that disclosure of information about export licence applicants supplied in confidence, linked to information about the type of goods and end-user, would compromise the willingness of companies and future applicants from sharing full details of trade activity because of concerns the

information would not remain confidential. DBIS argues that this could lead to companies looking to trade through overseas subsidiaries where the export control system may be different.

33. As a result, DBIS considers this would prejudice the ECOs ability to maintain confidence in the UK's system of export control and would not be in the public interest as it would impact on the ability of the UK to be involved in legitimate business by reducing unlicensed exporting activities.
34. The Commissioner also recognises the wider public interest in preserving the principle of confidentiality. He considers there is a strong public interest in the export licence application process operating effectively and ensuring that exporters who are applying for licences properly cooperate and engage with government departments. The Commissioner accepts that if information provided as part of the application process was disclosed and linked to specific companies this would undermine DBIS' confidentiality obligations and undermine this process.
35. The Commissioner also acknowledges there is a public interest in avoiding detriment to the commercial interests of the specific companies who applied for licences.
36. Having reviewed the 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 therefore considers the public interest in maintaining the duty of confidence outweighs the public interest in disclosure in this case.
37. In reaching his decision the Commissioner was not minded to accept there was any significant public interest in disclosure which has not already been met by the disclosures already made and the information already in the public domain on export licences and applications. Consequently, as he has recognised the strong public interest argument in maintaining the principle of confidentiality in this case, he is satisfied that a public interest defence could not be established in this case.
38. Therefore the Commissioner finds that the remaining information which has been withheld in this case has been correctly withheld on the basis of section 41 of the FOIA. He has therefore not gone on to consider the application of the section 43 exemption in this case.

## Right of appeal

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39. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Pamela Clements**  
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**Information Commissioner's Office**  
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