

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 December 2023

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

Decision (including any steps ordered)

1. The complainant has requested information on interactions between government and an organisation named Hakluyt¹. DBT provided redacted copies of the information it held. It relied on FOIA sections 43 – Commercial interests; 40(2) – Personal information; 41(1) – Information provided in confidence; 36(2)(b)(i) and 36(2)(c) – Prejudice to the effective conduct of public affairs to redact the information.
2. The Commissioner's decision is that the exemptions at FOIA sections 36(2)(b)(i) and 36(2)(c) are engaged and the public interest by a narrow margin favours maintaining the exemption.
3. The Commissioner does not require further steps.

¹ <https://hakluytandco.com/about/> explains the company as follows:

"Hakluyt advises decision-makers on the opportunities and risks facing their businesses. Our clients trust us with their most important commercial issues, and value our discretion and independence of thought.... Our advice is delivered by our in-house team of experienced professionals – drawn from diverse backgrounds including banking, government, strategy consulting, the not-for-profit sector, and the law – and informed by high-quality conversations held by well-connected individuals.

Few other business models depend on human relationships as much as ours: this, above all, is what makes us different."

Request and response

4. On 8 June 2022 the complainant made the following request for information to the Department for International Trade ("DIT")²:

"This is a request for information under the Freedom of Information Act. I would like to request the following information:

(1) According to transparency releases, Lord Grimstone of Boscobel met with Hakluyt to "discuss their investment into the UK". In light of this, please provide:

- A full list of attendees, including the full names and titles of each attendee, as well as who each attendee represents
- The exact time, date and duration of when the meeting took place - The location of the meeting
- A description of what exactly was discussed
- A copy of the agenda
- Materials that were handed out and received during the meeting, such as presentation slides, reports, data, and papers
- Minutes taken during the meeting, as well as any accompanying briefing notes and papers

(2) Please provide all correspondence and communications between Lord Grimstone and Hakluyt."

5. On 9 June 2022 DIT acknowledged the request.
6. On 29 September 2022, following the Commissioner's decision notice³ ordering DIT to respond to the request, DIT responded and explained that it held some information. With regard to the first point of the

² On 7 February 2023, under a Machinery of Government Change, the Department for International Trade ("DIT") began the transition into the Department for Business & Trade ("DBT"). The request in this case was made to DIT, however this notice will be served on DBT as the appropriate authority.

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021758/ic-185261-r3m6.pdf>

request, it provided redacted copies of an agenda and list of attendees for a call between Lord Grimstone, former Minister for Investment, and Hakluyt. DIT stated that there were no materials, accompanying briefing notes or papers, and no minutes taken. Regarding the second point of the request a redacted email was provided. The information was redacted in reliance of FOIA section 43(2) – commercial interests and section 40(2) – personal information.

7. On 3 October 2022 the complainant requested an internal review.
8. On 19 December 2022 DIT contacted the complainant to advise that it was still working on the internal review.
9. On 1 March 2023 the complainant requested an update as they had been waiting for their review for five calendar months.
10. On 15 March 2023 DBT provided the internal review and disclosed further information, previously withheld under section 40(2). It maintained its reliance on section 43(2) and in addition relied on FOIA section 41(1) – information provided in confidence.

Scope of the case

11. The complainant contacted the Commissioner on 15 June 2023 to complain about the way their request for information had been handled. They advised that the focus of their complaint was the information redacted from the one email regarding the second point of the request. They explained:

“I believe that it is in the public interest to shed light on the influence of a secretive intelligence firm that engages with ministers. It is essential to know what this intelligence firm recommended to Lord Grimstone, as well as the nature of their interactions. In 2021, openDemocracy revealed that there were no minutes kept of a meeting between Grimstone and Hakluyt. In light of this, it is essential for more transparency.”

12. Following the Commissioner’s request for submissions from DBT on 6 July 2023, DBT wrote to the complainant on 2 October 2023 explaining that it wished to additionally rely on section 36(2)(b)(i) and 36(2)(c) – Prejudice to the effective conduct of public affairs.
13. The complainant advised the Commissioner that they did not accept the application of the section 36(2) exemptions.

14. The Commissioner considers that the scope of this case is the application of the exemptions at sections 36(2)(b)(i) and 36(2)(c), 43(2) and 41(1) to redact the information held.

Reasons for decision

15. Section 36(2) of FOIA states:

“(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..

(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,

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

16. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person’s opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure of the requested information.
17. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring but also that the opinion was reasonable in the circumstances. This means that the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against. A public authority may rely on more than one exemption in section 36(2) as long as the qualified person has offered a view on each of the exemptions cited and the arguments advanced correspond with the particular exemption.
18. When deciding on the reasonableness of the qualified person’s opinion, the test to be applied is whether the opinion is one that a reasonable person could hold and not whether it is the most reasonable opinion. As stated, the critical issue is that the arguments being advanced by the qualified person not only link to the factors described in the exemption but also relate to the information to which the exemption has been applied.

19. The Commissioner notes that these exemptions are about the processes which may be inhibited, rather than the specific content of the information. He considers that the issue is whether disclosure would or would be likely to inhibit the processes of providing advice or the effective conduct of public affairs.
20. DBT advised the Commissioner that the qualified person in this instance is the Minister for Investment, Lord Johnson, successor to Lord Grimstone. The Commissioner is satisfied that, as an appropriate Minister of the Crown, the person consulted about the request meets the definition of a qualified person set out by section 36(5) of FOIA.
21. DBT advised the Commissioner that the qualified person was provided with a submission recommending the application of sections 36(2)(b)(i) and (c) and a copy of the information held. Minister Lord Johnson's office responded on 4 August 2023 stating "Lord Johnson has cleared this and is happy with it as drafted."
22. The Commissioner was provided with a copy of the written submissions presented to the qualified person.
23. DBT explained:

"The reasonable opinion of the qualified person is that the harm in releasing the information is that it would inhibit the free and frank provision of advice between Hakluyt and HMG [His Majesty's Government] and otherwise, the effective conduct of public affairs. DBT benefits from the advice and information exchange. There is a real concern that the nature and the quality of any relationship and the communication and advice HMG would receive, (especially when their expectation is that the deliberation containing this advice would not be released to the public), would be harmed if this information was to be released.

There is also a risk that disclosure would affect the willingness and way other companies such as Hakluyt would engage with DBT in future. The risk of disclosure and the potential precedent that sets would mean that companies would be unwilling to share information with DBT on transactions underway or other commercial investment intelligence if they felt there was a risk that information might be disclosed.

The Department needs to be able to engage external parties in a safe space within which discussions and communications can occur. Strong and trusted relationships are essential to DBT delivering its departmental objectives."

24. DBT acknowledged that the prejudice envisaged by section 36(2)(c) must be different to any other limb of section 36(2). It explained:

"The Department considers that the prejudice or harm is distinct and different and set out as follows:

- (i) the prejudice/harm arising under s.36(2)(b)(i) is that Hakluyt would no longer provide advice, information, and views to DBT/DBT ministers which in turn would cause harm to the Department's ability to gain beneficial insight into the trade and business landscape. Effectively this would inhibit receipt or the provision of beneficial views/advice into the Department; and
 - (ii) the prejudice/harm arising under s.36(2)(c) is that DBT would be restricted in being able to discuss matters freely and frankly with companies generally. The Department considers is that this a separate harm to that noted above (the receipt/provision of beneficial view/advice)."
25. The Commissioner notes that, in accordance with his guidance, DBT has consulted with Hakluyt regarding the disclosure of the requested information with respect to its application of sections 43 and 41. Hakluyt provided a lengthy response to DBT forcefully stating its objections to disclosure.
26. The Commissioner has viewed the withheld information which comprises the redacted sections of the email provided to the complainant.
27. The qualified person's opinion must consider whether the relevant prejudice or inhibition would, or would be likely to, occur. 'Would prejudice' means that it is more likely than not (ie a more than 50% chance) that prejudice would occur. 'Would be likely' is a lower standard which means that the chance of prejudice must still be significant and weighty, and certainly more than hypothetical or remote, but it does not have to be more likely than not that it would occur.
28. The Commissioner's guidance⁴ explains that "would prejudice" could be the case even if prejudice would occur on only one occasion or affect one person or situation, or given the potential for prejudice to arise in certain circumstances, and the frequency with which such circumstances arise (ie the number of people, cases or situations in which the prejudice would occur).
29. The Commissioner notes the qualified person has determined the level of prejudice to be "would prejudice". The Commissioner accepts as reasonable the opinion that disclosure of the information would pose a

⁴https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf

significant risk of inhibiting the free and frank provision of advice between external parties, such as Hakluyt, and government and would prejudice the willingness of third parties to voluntarily engage with DBT as a trusted contact for industry.

30. Having considered the information withheld under sections 36(2)(b)(i) and (c), and taking into account the qualified person's reasonable opinion, the Commissioner is satisfied that the exemptions are engaged.
31. Both exemptions at sections 36(2)(b)(i) and 36(2)(c) are subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemptions outweigh the public interest in disclosing the withheld information.

Public interest test

Public interest in favour of disclosing the information

32. DBT recognised that there is a public interest in understanding the relationship between Hakluyt and its engagement with government. It advised:

"There is a public interest in transparency to allow public scrutiny of the way Government engage with and utilise strategic information sources. There is a public interest in accountability so as to allow the public to determine whether consequent decisions made are of public benefit."

33. The complainant explained their view, as set out above in paragraph 11, which focusses on the public interest in transparency regarding the influence of "a secret intelligence firm" in its engagement with ministers.

Public interest in favour of maintaining the exemption

34. DBT advised the Commissioner that:

"The release of information would harm the willingness of Hakluyt to have free and frank provision of advice to HMG with the level of discretion that commercial subjects' transactions or market assessment requires. There is a public interest in ensuring businesses such as Hakluyt feel able to provide commercially sensitive information, discuss and provide their views or advice to HMG."

35. DBT explained specific public interest considerations for the two exemptions as follows:

"For Section 36(2)(b)(i), we consider the disclosure of this information would cause harm by inhibiting the free and frank provision of advice

between Hakluyt and DBT and there is a risk that it would affect the candid way other companies engage with DBT in future. Disclosure would also inhibit individuals from freely volunteering information, advice and opinions due to the anticipation of future premature disclosure and the potential criticism of early views or speculative assessments. Individuals would not be able to comment freely if they knew or suspected the information was going to be made public. Disclosure of this information may set a precedent for the publication of these exchanges and the advice it contains in future and would negatively affect the freedom in which future communication would be undertaken. Ultimately it would as a result to[sic] affect the quality of information HMG have available to them in insights for decision making. It is in the public interest to ensure an environment is maintained in support of the free and frank exchanges of information and advice.

For section 36(2)(c), discussions and communications with external parties rely on their own safe space within which issues can be discussed openly and frankly. The disclosure of this information would have a prejudicial effect on these relationships, which would not be in the public interest. Disclosure would mean that future correspondence in similar situations would be written with more circumspection, making any advice, opinions, or discussion less frank and therefore less useful. There is a public interest in ensuring the effectiveness of activity for DBT and its ability to deliver its objectives. It would not be in the public interest for confidence to be lost in DBT as a trusted partner.”

The balance of the public interest

36. The Commissioner considers that there is significant public interest in government departments operating in an open and accountable manner. He believes that greater transparency leads to better public understanding of particular issues. It therefore follows that transparency in matters such as those covered by the request in this case must carry weight when balancing the public interest.
37. The qualified person’s opinion will affect the consideration of the arguments for withholding the information, and the Commissioner considers that appropriate weight should be given to their opinion that the prejudice or inhibition would or would be likely to occur. The tribunal in *Department for Works and Pensions v Information Commissioner & Zola* [2016] EWCA Civ 758⁵ advised:

⁵ <https://www.bailii.org/ew/cases/EWCA/Civ/2016/758.html>

"It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of the competing public interests under section 36."

38. The Commissioner understands and appreciates the complainant's concerns, as previously noted, particularly as no minutes or notes were recorded from the call which took place.
39. The Commissioner is unable to directly reference the redacted information in this notice, however he notes that some of the topic discussed is already in the public domain. Notwithstanding this the Commissioner accepts DBT's explanation that the additional information contained in the redacted lines is not in the public domain.
40. The Commissioner has deliberated on the public interest in this case and finds it to be closely balanced. He has considered the arguments advanced by DBT and the complainant. He has thought carefully about the complainant's comment that it is "essential" for the public to know the content of the interaction between Hakluyt and government. He understands how the government's engagement with an advisory firm such as Hakluyt is a matter of legitimate public interest.
41. The Commissioner also notes that in its consideration of the former Director of Policy with the Prime Minister's Policy Unit at No.10 and former Special Adviser (Policy) at the Foreign, Commonwealth and Development Office, Jamie Hope's appointment to Hakluyt, the Advisory Committee on Business Appointments⁶ ("ACOBA") made reference to "Hakluyt's unknown clients".
42. In response to ACOBA's consideration of the appointment Hakluyt confirmed:

"Hakluyt does not work for the UK government and does not lobby politicians, officials or others on behalf of our clients."
43. Notwithstanding the connection with government demonstrated by the disclosed information, the Commissioner cannot accept that it is "essential" for the withheld information to be disclosed. It is clear that Hakluyt did not expect, or perhaps even consider, disclosure of its correspondence with Lord Grimstone. The Commissioner accepts that there is a public interest in businesses such as Hakluyt providing advice and information to government, which would be prejudiced if disclosure

⁶<https://www.gov.uk/government/publications/hope-jamie-director-of-prime-ministers-policy-unit-acoba-advice/advice-letter-jamie-hope-executive-hakluyt>

resulted in an inhibition by such businesses to volunteer or provide government with significant information or advice. He agrees that government requires such information and insight available to it to enable well-informed decision making. He agrees that it would not be in the public interest for confidence to be lost in DBT as a trusted partner of businesses if the loss of trust resulted in government not being provided with useful information. Although he believes that Hakluyt and other such businesses can derive benefits for their clients by their relationship with government departments, he nevertheless considers there to be a greater public interest in not adversely impacting any advantages which result from those same relationships benefitting the effectiveness of DBT and government.

44. In conclusion, based on the specific circumstances of this case, the Commissioner has decided, that the balance of the public interest favours maintaining the exemption.
45. As the Commissioner finds the information exempt from disclosure under sections 36(2)(b)(i) and (c) he has not considered the application of the other exemptions applied by DBT.

Other matters

46. As set out in paragraph 6 the Commissioner served a decision notice on DBT which resulted in it providing an initial response to the complainant. In this circumstance the Commissioner is particularly disappointed by the time taken by DBT to provide an internal review.
47. Although FOIA does not impose a statutory time within which internal reviews must be completed, the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days. In particular circumstances, for example when addressing complex issues or consulting with third parties, he accepts that more time may be required. This should be no more than an additional 20 working days, unless there are legitimate reasons why a longer extension is necessary.
48. In this case the complainant asked for an internal review of the outcome of their request on 3 October 2022. DBT did not provide the results of its review until 15 March 2023, 115 working days later. The Commissioner also notes that despite the time taken to complete the internal review DBT did not identify all the exemptions it considered to be relevant as it cited section 36 only at the time of his investigation. The Commissioner considers this to be an unacceptable delay for the complainant who had already suffered a significant delay in the provision of an initial response.

Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.

51. 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

Susan Hughes
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