

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 15 October 2009

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

### Summary

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The Department for Business, Innovation and Skills (BIS) withheld from the complainant, in March 2005 and subsequently, information about the Ministerial Direction by the Secretary of State for Defence to his Permanent Under-Secretary on 30 July 2003 regarding the purchase of the Hawk 128 advanced jet trainer aircraft. In deciding this matter, the Commissioner relied in part upon his decision in an earlier complaint by the same complainant against the Office of Government Commerce (reference FS50093000) concerning closely related subject matter.

The Commissioner decided that BIS did not comply with section 1(1) of the Act in not disclosing the relevant information by the time of completion of the internal review. BIS breached sections 10(1) and 17(1) of the Act by not issuing a refusal notice within 20 working days of the request. The internal review made no reference to the public interest in breach of section 17(3)(b) of the Act.

After a careful evaluation of the requested information, the submissions of the parties and the relevant provisions of the Act and case law, the Commissioner's decision is that section 26 of the Act was not engaged and that the section 29 exemption would not be considered.

He decided that BIS had properly applied the section 35(1)(a) and 35(1)(b) and 43(2) exemptions to parts of the information. For the section 35(1)(b) exemption the Commissioner found that the public interest in maintaining the exemption outweighed that in disclosing the information. With regard to the section 35(1)(a) and 43(2) exemptions, the Commissioner found that it was in the public interest to disclose part of the withheld information but not all of it. The Commissioner therefore ordered BIS to disclose some information to the complainant as set out in this Notice.

The Commissioner's decision is that BIS partially dealt with the request for information in accordance with the Act.

### 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 I of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

2. The Commissioner has seen that the issues raised by the subject matter of this request are in some material respects either identical with, or strongly related to, those raised in one earlier matter which has now been completed, and two other current matters, brought by the same complainant against other public authorities.
3. Each request concerned closely related subject matter, the events leading up to the Ministerial Direction by the Secretary of State for Defence to his Permanent Under-Secretary on 30 July 2003 regarding the purchase of the Hawk 128 advanced jet trainer aircraft (the Hawk jet) from BAE Systems (BAES). In his earlier decision, ICO reference FS50093000 issued on 14 July 2008 ("the lead decision"), the Commissioner found partly in favour of the public authority and partly in favour of the complainant. His reasoning in deciding the engagement of sections 26, 29, 35 and 43 of the Act and the balance of the public interest in the present matter follows that in the lead decision.
4. In 2007 relevant parts of the then Department of Trade and Industry were transferred to the then Department for Business, Enterprise and Regulatory Reform which is now known as the Department for Business, Innovation and Skills (BIS). For consistency and ease of reference, the department is referred to throughout this notice as BIS.
5. BIS explained by way of background that the Ministry of Defence (MOD) had decided in 2002 to procure a new advanced trainer jet for its Military Flying Training System. The decision process concluded with a Direction by MOD's then Secretary of State on 30 June 2003 to purchase the Hawk jet from BAES. The decision to purchase Hawk was reached after extensive discussions between departments and at the highest levels of government.

## The Request

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6. On 1 March 2005 the complainant asked BIS for *documents relating to the ministerial Direction on procurement of the Hawk 128 advanced jet trainer*.
7. On 29 March 2005, BIS told the complainant that they needed to extend the 20 working day time limit for issuing a response in order to make a determination as to the public interest and said they hoped to respond by 15 April. On 18 April 2005, BIS further extended this response date to 22 April.
8. On 21 April 2005 BIS replied refusing to disclose the information requested and citing the exemptions provided in sections 35(1)(a), 35(1)(b) and 43(2) of the Act in respect of each of eight documents being withheld. BIS also provided the complainant with a schedule listing the eight documents held that were relevant to the complainant's request.
9. On 24 May 2005 the complainant asked BIS to review the decision to withhold the information. On 15 June 2005 BIS wrote to the complainant to extend the time limit for doing so by 20 working days in order to make a determination as to the public interest. On 21 July 2005 BIS confirmed in a brief reply that an internal review had

taken place which had upheld the initial decision to withhold the information. The reply made no reference to any consideration of the public interest.

## The Investigation

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### Scope of the case

10. The Commissioner considered the process adopted by BIS in responding to the complaint and has considered the application by BIS of the exemptions in sections 35(1)(a), 35(1)(b) and 43(2) of the Act together with the balance of the public interest in withholding the information requested. Only those issues which are directly germane to the Commissioner's consideration of this matter have been outlined in this Notice.
11. More than two years after their internal review of the complaint in July 2005, BIS told the Commissioner that they wished additionally to rely upon the exemptions in sections 26 and 29 of the Act. The Commissioner decided that the section 26 exemption was not engaged. For the reasons set out below, the Commissioner decided that he would not consider the application of section 29.
12. Annex 2 of this Notice lists the documents within the scope of the request together with the exemptions applied to each by BIS and the Commissioner's decision on each.
13. The Commissioner considered application of the section 35(1)(b) exemption to documents 1, 1a, 2, 5, 6, 7, 8. This was the principal matter for him to decide. As described below, he decided that the exemption was engaged in all cases and that all except document 1 should be withheld in full on public interest grounds. He did not therefore proceed to consider the application of other exemptions to documents 1a, 2, 5, 6, 7, 8.
14. For documents 1 and 3 the Commissioner considered the application of the exemptions in sections 35(1)(a), and 43(2) of the Act. For document 4, the Commissioner considered the application of the exemption in section 35(1)(a).
15. Document 6a has been the subject of a separate decision by the Commissioner, recorded in Decision Notice FS50093000 which was issued to the same complainant on 14 July 2008. Accordingly he gave that matter no further consideration here.

### Chronology

16. The complainant was dissatisfied with the result of BIS's internal review and, on 19 September 2005, he made a complaint to the Commissioner under section 50 of the Act and asked him to review BIS's decision to withhold the requested information.
17. On 1 February 2006 the Commissioner asked BIS for copies of the withheld information and for further comments on their application of the exemptions in

sections 35 and 43 of the Act. Comments were subsequently provided by BIS on 15 March 2006 in a letter from the relevant Director General

18. On 26 April 2007 the Commissioner asked BIS for any new submissions or other information it wished him to consider regarding application of the exemptions provided in section 35 of the Act and to examine the information being withheld. On 4 June 2007 and again on 12 June 2007 the Commissioner repeated his request to be allowed to examine the withheld information and asked BIS for its further comments on the application of the exemption set out in section 43(2) of the Act.
19. On 25 June 2007 BIS provided the Commissioner with copies of eight documents, listed as documents 1 – 8 at Annex 2 to this Notice, that were being withheld from the complainant. BIS also provided in confidence detailed representations on the application of the section 35(1)(a) and (b) and 43(2) exemptions to the withheld information and the balance of the public interest. BIS said that their role in the procurement was to ensure that MOD took account of the wider industrial factors. BIS added that this was consistent with their role in the 2002 Defence Industrial Policy and the 2005 Defence Industrial Strategy of maximising the economic benefit to the UK from defence expenditure and to maintain a competitive defence industry.
20. On 9 October 2007 BIS told the Commissioner that they had applied the section 35 exemptions to the whole documents. BIS said that, following a further review of the complaint they now wished additionally, to rely upon the exemptions provided in sections 26(1)(b) and 29 (1)(a) of the Act. BIS also provided a summary of their public interest grounds for withholding the information. BIS said that a further relevant letter had come to light, listed as document 6a at annex 2 to this Notice.
21. Also on 9 October 2007 BIS confirmed that the policy relevant to the application of the section 35 exemptions was the Defence Industrial Policy of 2002 (the 2002 policy). BIS said that the 2002 policy had not simply been formulated and then enacted but rather had been under constant review. A first review of the 2002 policy had been carried out in 2003 and had made specific references to the Hawk jet acquisition. BIS said that the development of policy could not be defined as an endlessly expanding web nor, in BIS's view, was it ended by an announcement. BIS added that the 2002 policy had eventually been superseded by publication of the Defence Industrial Strategy in late 2005.
22. On 10 September 2008 BIS provided further information and a further document to the Commissioner (listed as document 1a in the schedule at annex 2 to this Notice) and confirmed that it held no other information within the scope of the request that had not by then been provided to the Commissioner.
23. The document listed as 6a at annex 2 of this Notice (a letter from the chief executive of the Office of Government Commerce (OGC) to the then Deputy Prime Minister dated 11 July 2003) had been the subject of a separate Decision Notice (ICO reference FS50093000) issued by the Commissioner on 14 July 2008. On 8 September 2008 OGC appealed the Commissioner's decision to the Information Tribunal but on 21 November 2008 accepted his decision and withdrew the appeal.

24. The Commissioner, through his staff, has examined all of the information which is within the scope of the request and is being withheld by BIS.

### **Findings of fact**

25. BIS showed the Commissioner a further letter, dated 12 May 2003, from the then Secretary of State at BIS to the then Secretary of State for Defence which had been mentioned in document 1. He saw that the 12 May 2003 letter made no reference to the Ministerial Direction and was therefore outwith the scope of the request.

26. On 30 July 2003 the then Secretary of State for Defence issued his Ministerial Direction to the then Permanent Under-Secretary at MOD (PUS) to proceed, subject to successful negotiations, with an initial order for 20 Hawk jets (the Hawk Direction). On 5 August 2003, the PUS formally notified HM Treasury and the C&AG of the decision by the then Secretary of State for Defence (the NAO referral). In his letter to the C&AG, the then PUS confirmed that the Hawk Direction had been issued on value for money grounds and that there were no issues relating to regularity and propriety.

27. In October 2002, the UK Government launched the 2002 policy. The 2002 policy was founded "*on the importance of equipping UK Armed Forces efficiently with the tools they require to meet the challenges they face*".<sup>1</sup> The 2002 policy was eventually superseded by the Defence Industrial Strategy on 15 December 2005.

### **Analysis**

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#### **Procedural**

28. In not disclosing the information which should have been disclosed by the time of completion of the internal review of the complaint, BIS were in breach of section 1(1)(b) of the Act.

29. In not providing an answer to the request within 20 working days of its having been made, BIS were in breach of sections 10(1) and 17(1) of the Act.

30. By seeking an extension of time to provide the information or a refusal notice and then not responding within the time given, BIS were also in breach of section 17(2)(b) of the Act.

31. In not referring to the public interest test in the letter of 21 July 2005 setting out the outcome of their internal review of this matter, BIS were in breach of section 17(3)(b) of the Act.

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<sup>1</sup> MOD Policy Paper number 5 "Defence Industrial Policy" at page 14.

## Exemptions

### Section 35 – Formulation of government policy, etc

#### Section 35(1)(b)

32. The principal exemption which the Commissioner has considered in this matter is that at section 35(1)(b) of the Act, relating to Ministerial communications. Ministerial communications means any communication between Ministers of the Crown (section 35(5) of the Act). This may include communications between a private secretary writing on behalf of a minister and another minister (as decided by the Tribunal in the Scotland Office case, EA/2007/0070 at paragraph 50). BIS applied the section 35(1)(b) exemption to documents 1, 1a, 2, 5, 6, 7 and 8. The Commissioner saw that the documents to which BIS had applied the section 35(1)(b) exemption were communications between ministers and was therefore satisfied that the exemption was engaged. Where he was also satisfied that the public interest in maintaining the exemption outweighed that in disclosing the information (which was for documents 1a, 2, 5, 6, 7, 8) he did not proceed to consider the application of the section 35(1)(a) exemption, or other exemptions to those documents. For document 1a, the Commissioner decided that the public interest in maintaining the exemption did not outweigh that in disclosing the information.

#### Public interest

33. The complainant told BIS and the Commissioner that he was disappointed that not a single line from the documents requested could be released which, he said, showed an unnecessary caution. He said that the case involved expenditure of a large amount of public money, some £3 billion, along with a ministerial direction, and such directions were rare and therefore significant. He believed that BIS had misjudged the balance of the public interest and that there was an overwhelming need to explain to the public why such a direction was required on a contract which would consume a large sum of taxpayers' money. He believed that this need outweighed the blanket justification used to keep secret every single line of the documents.
34. BIS told the Commissioner that they recognised the public interest in expenditure decisions taken by government departments, particularly those associated with a Ministerial Direction. They acknowledged the general public interest in the disclosure of information and in public participation in government policy decisions. The policy decision to procure the Hawk jet had led to a large amount of public expenditure on the procurement of aircraft and it was reasonable to assume that there was a public interest in being able to assess the quality of advice and the accountability of government decisions. The value for money issues that this particular procurement had raised was already public knowledge, but the detailed arguments underpinning the Hawk Direction were not. Disclosure of the information would therefore inform the public of the analysis and discussions that had led to the Hawk Direction.
35. However, BIS said that they had also considered the wider impact of releasing this specific information and concluded that to release any of these documents could, directly or indirectly, significantly inhibit future policy-making and advice, especially in connection with any future ministerial directions. It was important for the government

to be able to discuss all options, allowing an informed and frank debate, and enabling it to reach effective decisions about the spending of public money. BIS said that the Information Tribunal's judgment on *DfES vs Information Commissioner and Evening Standard (EA/2006/006)*, acknowledged the importance of frank debate, fearless advice, impartial officials, full record keeping and ministerial accountability. That decision had said that consideration should be given to the peril posed by undermining those fundamental principles of governance, and on a case-by-case basis.

36. BIS said that in this matter the request was for a full record of a very frank debate on a sensitive issue at a high level of government. The Hawk Direction had been given individually by a minister after a full and frank discussion with other ministers, and is a decision for which the Cabinet took collective responsibility. Collective responsibility is a constitutional convention described in the Ministerial Code that ensures that good decision-making is based on a consideration of all the possible options. Nothing in the Act was intended to undermine that principle and minister to minister communications were explicitly identified as potentially exempt information, subject to the public interest balance. BIS said that the public interest lay in upholding this constitutional convention that ensured good decision-making. Whilst ministers were required to support Government policy, there was a need to protect the confidentiality of discussions between ministers, allowing them to express their views frankly in private whilst maintaining a united front once a decision has been made. If ministers were to feel inhibited about being frank and candid with one another because of the risk of subsequent disclosure, the quality of debate behind the collective decision would be diminished.
37. BIS added that ultimate responsibility for government decisions lay in the Cabinet. Collective responsibility sought to ensure that decisions did not become personalised. Without this, opponents of certain policies might use any divisions to try and play one department off against another. To identify even the date and individual minister to which the correspondence related was itself information which related to policy formulation as it might provide a link to the types of events that were being discussed. Disclosure of this type of information about the policy making process would begin to erode the space within which policy was developed and impair the discussions that relied on its existence.
38. BIS said that if this information was released, it would make it harder for a minister to subsequently publicly defend a decision about which they had expressed concerns in private. The way of avoiding such an outcome being repeated in the future would be to reduce the flow of information between departments on other similar decisions reducing the ability of ministers to enter into frank discussions on issues which cut across more than one department and could mean that ministers would be taking decisions without full knowledge of the facts which would undermine the decision making process. Alternatively there might be a reluctance on behalf of ministers to record their views for fear of future release and this would be detrimental to the quality of the discussion and government administration. Overall this would lead to a lower standard of governmental decision making and reduce the ability for cross-departmental working. It was important for ministers to maintain the ability to have free and full debate on important government decisions. If ministers feel inhibited from being frank and candid with each other in debate because of the prospect of

subsequent disclosure, the quality of the debate lying behind the collective decision would be diminished and collective responsibility of government weakened.

39. BIS said also that there was a strong public interest in maintaining the quality of government policy making through allowing 'private thinking space' where free and frank exchanges can occur, and officials are able to consider thoroughly all policy options without fear of having to defend their advice publicly. The ability of the civil service to provide free and frank advice might be undermined if internal advice or the exchange of views was routinely made public. Less candid and robust discussions about policy, a fear of exploring extreme options and the avoidance of hard choices could lead to poor quality government policy making in the future. In addition, disclosure of the inter-departmental consideration and communications between ministers might undermine the collective responsibility of the government.
40. BIS added that the Parliamentary process for the handling of ministerial directions provided an additional mechanism by which the public interest was protected. This included the procedure whereby the C&AG and the Public Accounts Committee, who had oversight of spending, were made aware of the existence of any ministerial direction and could investigate the expenditure as they saw fit.
41. The Commissioner has considered carefully all the arguments raised by both the complainant and BIS. He accepts the case put forward by the complainant that as much as possible of the relevant information should be made available to the public in view of the large sums of public money involved and the rarity of ministerial directions. He also accepts the case put by BIS with regard to the need to protect the principle of the collective responsibility of ministers and the need for a safe space within which they can discuss policy matters freely and frankly. In reaching his conclusions in this matter, the Commissioner had regard for the fact that - at the time of the request, the initial refusal and the internal review of that refusal - some of the ministers concerned were still in government, or other high public office. He noted that that is still true for some of the relevant ministers although none are now in their then posts. In reaching his decision the Commissioner also took careful note of the content of the information that was being withheld. The Commissioner did not accept that release of any of the relevant information could adversely affect record keeping now or in the future.
42. The Commissioner also had regard to the passage of time since these matters occurred in the summer of 2003 and the request by the complainant of March 2005. Relevant events have included the change of government in May 2005 following a General Election and the fact that the 2002 policy, which had been published in October 2002, was superseded by the Defence Industrial Strategy in December 2005. By the time of BIS's refusal to provide the information in April 2005, and particularly the time of the internal review of that decision in July 2005, the formulation and development of the 2002 policy, which BIS confirmed to the Commissioner that they had relied upon in this matter, had largely run its course and was of rapidly diminishing relevance.
43. The Commissioner considered BIS's argument that the date, origins and titles of the relevant documents should be withheld as being itself sensitive information. However he did not accept BIS's submission because he considered that the fact of ministerial



involvement in the debate, as distinct from the substance of their interventions, to be a matter of legitimate public interest in helping to make plain the process by which ministers had reached their decisions up to and including the time of the issue of the Direction. Accordingly he decided that this information was proper for inclusion within annex 2 to the Notice but decided that this information should not form part of the public record until after the time allowed for making and determining any appeal by BIS has expired.

44. In deciding that the information had been correctly withheld under the section 35(1)(b) exemption by virtue of the public interest, the Commissioner made one exception, that of document 1. He has seen that the content of this document is procedural in nature, that its contents contain no indication of matters that fall within the public interest principles against disclosure as set out above and considered that it could helpfully be added to the information in the public domain without risk of harm being caused to future ministerial communications or to any present and future issues likely to arise from the matters of substance that were central to the Hawk decision. In coming to this view, the Commissioner has had regard to the *Evening Standard* case (*DfES v the Information Commissioner & the Evening Standard*, EA/2006/0006) and his clear view that, on a common sense approach to document 1, disclosure of the information it contains would cause no significant damage to the public interest.

### **Section 35(1)(a)**

45. BIS also relied upon the section 35(1)(a) exemption which they applied to all of the documents being withheld. Having decided that documents 1a, 2, 5, 6, 7 had been correctly withheld under the section 35(1)(b) exemption, the Commissioner did not proceed to consider the application to them of section 35(1)(a). In his analysis the Commissioner therefore only considered the application of the section 35(1)(a) exemption to: document 1, document 3 paragraphs 1 – 5, 8 and 11 only, and document 4.

46. In considering the section 35(1)(a) exemption, the Commissioner took into account the information provided by the complainant.

47. BIS told the Commissioner that the section 35(1)(a) exemption had been applied as the information related to the development of defence policy and its interaction with policy on public spending, in particular in relation to the development of the government's policy of securing and maintaining high technology defence capability in the UK. The proper use of section 35(1)(a) was to protect the policy-making process and ensure that this process remains able to deliver effective decisions.

48. BIS said that their involvement in the decision was predominantly in relation to the development and implementation of the 2002 policy, a policy sponsored by MOD and BIS. The 2002 policy had recognised the importance of maintaining a competitive UK defence industry and sought to maximise economic benefit to the UK from defence expenditure. The 2002 policy had considered a wide range of factors including military capability, government industrial policy and overall value for money. BIS said that the policy had not been one that was formulated and then implemented once for all but rather had been under constant review so that it was flexible to the complex

needs of the UK's defence industry and the UK's armed forces. The Hawk jet procurement had been taken forward under this policy. Because of competing priorities within the 2002 policy the advanced jet trainer procurement had required careful consideration and the decision taken had reflected the over-riding concerns that had led to the Direction, as the Direction itself made clear, in saying that: *"An order for a new advanced variant of the successful Hawk aircraft would support our high technology aeronautical capability, including skilled jobs, and assist future exports of Hawk variants."*

49. BIS said that the review of the 2002 policy carried out in 2003 showed how the Hawk jet acquisition contributed to the development of this policy by specific references to it.
50. BIS noted the Information Tribunal's analysis in paragraph 75(v) of the Evening Standard case: *"We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House."* Policy, BIS accepted, cannot be defined as an endlessly expanding web, however, they said, neither was it ended by an announcement. The 2002 policy was eventually superseded by the Defence Industrial Strategy in late 2005. BIS added that the proper use of section 35 of the Act was essential to protect the policy-making process and ensure that this process remained able to deliver effective government. Information found in a wide range of documents including submissions to ministers, correspondence with other departments in connection with policy development, internal departmental correspondence, drafts of such documents and ancillary documents such as e-mails discussing points arising on drafts are captured by this section of the Act.
51. The Commissioner saw that the information being withheld related to the development of the 2002 policy in so far as its formulation and development was still in progress at the time of the internal review of BIS's initial response to the request in July 2005. The Commissioner was therefore content to accept that the section 35(1)(a) exemption could be said still to be engaged.

### **Public interest**

52. The Commissioner accepted that the complainant's case concerning the need for transparency governing the large amounts of public money involved and the need for a ministerial direction applied equally to the section 35(1)(a) exemption as to the section 35(1)(b) exemption.
53. BIS did not provide separate representations as regards the section 35(1)(a) public interest and the Commissioner took into account their earlier representations in so far as they were relevant to section 35(1)(a) but discounted the issues that related specifically to ministerial communications, i.e. those relating to the maintenance of ministerial collective responsibility, the safe space needed for ministers (while recognising that officials too need safe space) and that some ministers remain active in public life.
54. The Commissioner's principal consideration in weighing the public interest in the context of section 35(1)(a) exemption was the content of information; he also noted

the passage of time. The relevant documents (documents 1, 3 (part) and 4) contain much to illuminate public understanding of the process followed by government in the events leading up to the Direction and the Commissioner has seen nothing that would harm the continued development of the 2002 policy during the last few months of its currency as it migrated into the 2005 Defence Industrial Strategy. Accordingly the Commissioner decided that the public interest in maintaining the section 35(1)(a) exemption did not outweigh that disclosing the information and required BIS to disclose the relevant information as indicated at annex 2 to this Notice.

## Section 29 – The economy – late citation

55. The Commissioner decided not to consider the application of the section 29 exemption to documents 1 and 3. This was introduced by BIS late on in the process (more than two years after the internal review). Where a public authority has not referred to a particular exemption or exception when refusing a request for information, the Commissioner may exercise his discretion and decide whether, in the circumstances of the case, it is appropriate to take the exemption or exception into account if it is raised in the course of his investigation. The Commissioner is under no positive duty to consider exemptions or exceptions which have not been referred to by a public authority but may do so if it seems appropriate to him in any particular case. In *King v Information Commissioner and the Department for Work and Pensions* the Tribunal found that: “*the Commissioner and the Tribunal have the power to consider exemptions raised in front of them for the first time. Whether it will consider a recently raised exemption will depend on the facts in each case*” (Tribunal’s emphasis) (para 55). This statement suggests that the Commissioner has discretion whether or not to consider exemptions raised before him for the first time.
56. The issue was clarified in *the Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth (EA/2007/0072 – the BIS case)*. The Tribunal questioned “*whether a new exemption can be claimed for the first time before the Commissioner*” and concluded that the Tribunal (and by extension the Commissioner) “*may decide on a case by case basis whether an exemption can be claimed outside the time limits set by [sections] 10 and 17 depending on the circumstances of the particular case*”. The Tribunal also added that “*it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations*”. The Commissioner has adopted this approach.
57. When assessing the circumstances and before exercising his discretion to take into account an exemption cited by a public authority late in the process, the Commissioner must carefully consider his obligations under the Human Rights Act 1998 (HRA), which prevent him acting incompatibly with rights protected by the HRA. He has seen none in this matter. Given the circumstances surrounding national security and defence matters the Commissioner did not refuse to consider the application of the section 26 exemption but, for the reasons set out below, he did find that it was not engaged as regards relevant documents.

58. The Commissioner regarded it as appropriate and proportionate not to consider the exemption set out in section 29 of the Act owing to the excessively late citation of the exemption and its applicability. He noted that no defence, health and safety or human rights issues appeared to him to arise in the context of the information to which BIS had sought to apply the section 29 exemption. He therefore did not proceed to consider application of the section 29 exemption to documents 1 and 3 either on his own initiative or in response to the excessively late request for it to be considered. In respect of the other documents to which BIS sought to apply the section 29 exemption, the Commissioner decided that the relevant information had been correctly withheld under the section 35(1)(b) and 43(2) exemptions and for that reason did not proceed to consider if the section 29 exemption applied to them.

## Section 26 – Defence

59. The Commissioner considered the application of the section 26(1)(b) exemption to documents 1 and 3, the only documents where the issue is relevant given the Commissioner's decisions regarding the section 35 exemptions which are set out above. Section 26 exempts information if its disclosure would, or would be likely to, prejudice the capability, effectiveness or security of the UK's armed forces or its allies.

60. In their representations to the Commissioner, BIS said that the section 26(1)(b) exemption was applicable as disclosure would prejudice defence capability which involved having the necessary skills, trained manpower and equipment to deploy and conduct operations. BIS said that BAE Systems (BAES) currently supplies numerous goods and services to the Armed Forces via contracts with the MOD. Many of these contracts implied long term agreements designed to ensure value for money and, in some cases, protected the supply of key elements of industry into the future. Any commercial damage to BAES caused by the release of information about the Hawk jet could impact upon MOD's relationship with BAES and the effectiveness of the company and its ability to serve MOD in the future and prejudice the ability of the armed forces to obtain the best value support for its fighting equipment. BIS added that the Ministerial Direction had highlighted the importance of the procurement in terms of supporting aeronautical capability and skilled jobs: *"It would support our high technology aeronautical capability, including skilled jobs, and assist future exports of Hawk variants."* BIS conceded that any effect might not be immediate, but said that the loss of specialist aeronautical capability would be likely to prejudice the company's effectiveness and thence the ability of the armed forces to acquire the equipment it needs in future and support equipment already in service.

61. The Commissioner needs first of all to establish whether this exemption can be appropriately applied to the information at issue. The Commissioner is not, in this case, satisfied that it can. The information sought here relates to a Ministerial Direction. This was issued because concerns had been expressed by the PUS about a proposed contract in respect of its value for money aspects. The Commissioner notes, in that context, that MOD has also cited exemptions 29 and 43 of the Act in relation to the withheld information. These deal, respectively, with the economy and with matters of commercial confidentiality, topics that identify much more closely with the kind of issues with which the Ministerial Direction was concerned. In the Commissioner's view these sections of the Act are perhaps more appropriately

applied to the information at issue than section 26, which relates specifically to matters of defence and physical security. The Commissioner is not therefore satisfied that release of the information sought would cause, or be likely to cause, prejudice of the kind envisaged under this exemption. The exemption is therefore not engaged. On that basis there is no requirement for the Commissioner to consider the public interest test.

### Section 43 – Commercial interests

62. Section 43(2) of the Act exempts information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including those of the public authority holding it.) Following his decisions regarding the s35 exemption, the section 43 exemption is only relevant in this matter to the application of the Act to documents 1 and 3 and the Commissioner has only considered its application to those two documents.

63. With regard to sections 26 and 43 and the issue of prejudice, the Commissioner has applied the test of 'likely to prejudice' as established 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*, which was followed by the Information Tribunal in the case of *John Connor Press Associates Limited and The Information Commissioner*<sup>2</sup> where the Information Tribunal interpreted the expression 'likely to prejudice', within the context in this case of the section 43 exemption, as meaning that the chance of prejudice being suffered should be more than hypothetical or a remote possibility; in effect, there must be a real and significant risk. The Tribunal in that case indicated that the degree of risk must be such as to show that there 'may very well' be prejudice<sup>3</sup>.

64. In *Hogan and Oxford City Council -v- The Information Commissioner*<sup>4</sup>, the Information Tribunal applied Mr Justice Mundy's test to section 31(1) of the Act. In the above appeals, the Information Tribunal stated that "...there are two possible limbs on which a prejudice based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not...The s31(1) prejudice 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."

The Information Tribunal also confirmed that, "an evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice."

65. BIS told the Commissioner that the information held provided a candid assessment of the Hawk 128 jet the disclosure of which would be likely to prejudice the commercial interests of MOD, the supplier and Aermacchi, another aircraft

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<sup>2</sup> EA /2005/0005

<sup>3</sup> This test of "likely to prejudice" has also recently been confirmed by the Information Tribunal in *OGC v The Information Commissioner EA/2006/0068 & 0080* paragraphs DFES 42 – 48).

<sup>4</sup> EA/2005/006, EA/2005/00300

manufacturer. BIS provided further supporting information to the Commissioner in confidence to support this argument. BIS accepted that the sensitivity of commercial information and the corresponding prejudice could in some instances, decrease over time but said that release of the information at this stage would undermine the government's broader relationship with the industry since it would affect the confidence of the industry in the government's commitment to safeguard information provided to it on a confidential basis, thereby impairing MOD's relationship with the defence industry. BIS added that MOD had reviewed the relevant documents and had been satisfied that they contained commercially sensitive details of the Hawk jet.

66. The Commissioner has considered this argument carefully but does not concur with it. His view is that, following the implementation of the Act, persons or companies contracting with public authorities should now expect that their commercial dealings will be subject to a high level of public scrutiny and that this should be seen as part of the expectations when dealing with MOD (or other public authorities).
67. However, after applying the prejudice tests, the Commissioner is nevertheless satisfied that disclosure of the information falling within this exemption would be likely to prejudice the commercial interests of MOD and possibly the commercial interests of others as well. The Commissioner has noted that the information sought includes references to handling MOD's relationship with BAES. The Commissioner accepts that the specific issue under consideration at the time of the Ministerial Direction had long been resolved by the time the request was made to BIS in March 2005: the transaction had been agreed and the broad details put into the public domain. However, MOD and other Government departments will continue to enter into contracts with companies in the private sector. The Commissioner believes that disclosure of this kind of information would be detrimental to the MOD's bargaining position in any such future dealings, not just with BAES but with other companies. It could lead to a reduction in MOD's ability to obtain best value for money from the company concerned. Accordingly the Commissioner is satisfied that, in releasing the information, there is a real and significant risk that prejudice to the commercial interests of the MOD would be likely to occur.
68. The Commissioner recognises that BAES is operating in a highly competitive market and that disclosure of some of the commercial information contained in the documents might enable competitors to use that information to the commercial disadvantage of BAES. This disadvantage would very likely damage both the company's reputation and its ability to compete in the export market for advanced jet trainers and other defence products. Such a situation could lead, for example, to the further loss of sales opportunities, loss of market share, and a loss of profits. The Commissioner is therefore satisfied that disclosure of the redacted information would be likely to prejudice the commercial interest of BAES.
69. Accordingly the Commissioner is satisfied that section 43 is engaged in respect of the withheld information because he considers that disclosure would be likely, to prejudice the commercial interests of both the government, especially MOD, and BAES. He then moved to consider the application of the public interest.

## Public interest

70. As noted previously, the complainant told the Commissioner of his concerns about what he saw as the need for BIS to explain its role in the giving of a Ministerial direction, which was in itself a rare event, and the expenditure of some £3 billion of public money without a tendering process. He considered that the sensitivity of the information had decreased compared with the period just before or just after the award and that the time was now right for it to be disclosed in the public interest.
71. The case made by BIS for withholding the information on public interest grounds under the section 43(2) exemption remains the same as that set out for the section 35 exemptions above and the Commissioner has fully considered those arguments when reaching his decision on the balance of the public interest as regards section 43(2).
72. The Commissioner acknowledges the arguments submitted by the parties and has considered carefully these competing views of the public interest. He has concluded that, on balance, the public interest lies in a partial disclosure of the withheld information relating to commercial and economic matters. In reaching this conclusion the Commissioner has considered the competing public interest arguments against disclosure:
- the timing of the complainant's request,
  - the nature of the sensitive commercial and economic information contained in the withheld information,
  - the fact that the Hawk jet was on the relevant date still being marketed and sold to other countries,
73. To facilitate the partial disclosure of this information, the Commissioner has set out his decision at Annex 2 of this notice. The Commissioner's conclusions on the partial disclosure of this information are based on the following considerations.

## Redacted Information

74. With regard to the information that he has redacted, the Commissioner believes that the potential harm that would be caused by its release outweighs the public interest in its disclosure. In reaching this conclusion the Commissioner is mindful of the strong public interest in promoting openness and transparency in the procurement processes for awarding government contracts and of the importance of the arguments set out below in relation to information which he believes should be released.
75. However, after close consideration of the potentially detrimental effects of disclosure, the Commissioner believes that the commercial sensitivity and confidentiality of the redacted information in the period between July 2003 and the relevant date remained at a sufficient level to justify non-disclosure. In addition, the Commissioner believes that the essential purpose of the ministerial direction process is the recognition that an effective government will from time to time need to take decisions that will be controversial. The Hawk Direction highlighted the fact that major procurement decisions are often influenced by considerations other than the need solely to achieve best commercial value. For example, one of the stated objectives of the

2002 policy was to “*maximise the economic benefit to the UK from [its] defence expenditure, a healthy and globally competitive defence industry and the development of a high-value technologically skilled industrial base, consistent with Government’s wider manufacturing strategy*”. Therefore, the Commissioner found that the desirability for openness and transparency to be gained by releasing the redacted information was not sufficient to outweigh the harm that would be caused, in this case, to the commercial interests of BAES and the government.

76. Consequently the Commissioner finds that, in all the circumstances of this case, the public interest in maintaining the exemption in section 43(2) outweighs the public interest in disclosing the redacted information.

### **Non-redacted Information**

77. With regard to the information that has not been redacted, the Commissioner believes that the potential harm that would be likely to be caused by its release would not outweigh the public interest in disclosure.

78. The Commissioner considers that, due to the substantial size of the contract awarded to BAES, the disclosure of the non-redacted information would enable the public to better understand the value for money issues, analysis and discussions that might explain why the Hawk Direction had been issued. In addition, the Commissioner believes that disclosure would promote greater openness and transparency. In his view, this increased transparency would:

- improve the quality of future decisions and enable the public to better assess whether MOD had acted appropriately in the eventual decision to purchase the Hawk jet.
- help to reassure the public that all relevant information had been taken into account in the decision to place the order for the Hawk jets.
- enable the public to understand the value for money issues, analysis and discussions that would explain why the Hawk Direction had been issued.

79. Therefore, in the particular circumstances of this case, the Commissioner considers that the desirability for openness and transparency through releasing the non-redacted information, and the benefit to the public interest in this material being made available, is sufficient to outweigh the harm that would, or would be likely to, be caused by its disclosure. Accordingly, for this information, the Commissioner is satisfied that the public interest in maintaining the section 43(2) exemption does not outweigh the public interest in the OGC disclosing the non-redacted information.

80. Following his analysis, the Commissioner compiled a redacted version of the information being withheld from the complainant by BIS that accorded with his analysis and which is summarised at annex 2 of this notice. Annex 2 does not form part of the public record of the Commissioner’s decision until after the expiry of the period of time allowed for any appeal by BIS against his decision to be made and determined.



## The Decision

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81. The Commissioner's decision is that BIS dealt with the following elements of the complainant's request for information in accordance with the Act:

With regard to the information which he decided should be withheld, the Commissioner decided that BIS has correctly applied the exemptions provided at sections 35(1)(a), 35(1)(b) and 43(2) of the Act.

82. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

With regard to the information which he decided should be released, the Commissioner's decision is that BIS has not correctly applied the exemptions provided at sections 26(1)(b), 35(1)(a) and (b), and 43(2) of the Act.

## Steps Required

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83. As set out in annex 2, the Commissioner requires the public authority to take the following steps to ensure compliance with the Act, that is to disclose:

- document 1 in full
- document 3 paragraphs 1 – 5, 11 (i.e. the penultimate bullet point) and 13 (the final paragraph)
- document 4 in full
- document 6a, disclosure as already ordered in the Commissioner's decision set out in Decision Notice FS50093000, a related matter raised by the same complainant.

This information must be disclosed to the complainant within 35 days of the date of this Notice.

## Right of Appeal

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84. 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  
LE1 6ZX

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)

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.

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 October 2009**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Annex 1

### Legal Annex

#### General Right of Access

**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.”

#### Time for Compliance

**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.”

#### Refusal Notice

**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 17(2)** provides that –

“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.”

**Section 17(3)** provides that -

“A public authority which ... is to any extent relying:

- on a claim 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 public authority holds the information, or
- on a claim that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

must either in the notice under section 17(1) or in a separate notice within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, on a claim 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 public 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.”

### **Defence**

**Section 26(1)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the defence of the British Islands or of any colony, or
- (b) the capability, effectiveness or security of any relevant forces.”

### **The economy.**

**Section 29(1)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the economic interests of the United Kingdom or of any part of the United Kingdom, ...

### **Formulation of Government Policy**

**Section 35(1)** provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications, ... .

**Section 35(5)** provides that –  
“In this section-

...

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

...

### **Commercial interests.**

**Section 43(2)** provides that –

“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).”