

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 20 September 2011**

**Public Authority:** The Foreign and Commonwealth Office  
**Address:** King Charles Street  
London  
SW1A 2AH

#### **Summary**

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The complainant requested all the documentation held by the Foreign and Commonwealth Office ('the FCO') which was referred to in its communications with the ICO during the Commissioner's investigation of the case referenced FS50302176. The complainant clarified his request to include 'all records' requested in the case referenced FS50302176. The FCO refused to provide the information it held citing the exemptions contained at the following sections of the Act: 41, 40(2) and 40(3). The Commissioner has concluded that the information falling within the scope of the request is exempt from disclosure on the basis of section 41(1). However, the FCO breached sections 10(1) and 17(1) by failing to respond within twenty working days.

#### **The Commissioner's Role**

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

#### **Background**

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2. This decision notice relates to a previous notice (FS50302176, a link is provided below) and concerns the same subject matter. The request considered in that decision notice concerned 'all records' and 'any relevant documentation' held by the Foreign and Commonwealth Office (FCO) on export licence applications made by a named company. This

request was as a direct result of the Commissioner's investigation of the complainant's previous complaint against the FCO regarding the same information. The request in this case was made before the conclusion of the earlier case.

3. In the matter of export licences for items of military equipment the FCO acts in a policy advisory capacity by providing advice and analysis to the Department of Business, Innovation and Skills (BIS) on relevant export licence applications against the consolidated European and national arms export licensing criteria.
4. The notice resulting from the previous case noted that to clarify and avoid any misunderstanding, the FCO explained that it did not hold any records of actual exports but provided advice on licences to BIS, prior to issue or refusal. The FCO said that the existence of an export licence did in no way prove the existence or lack thereof of an actual export.

## The Request

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5. On 6 August 2010 the complainant made a request for the following information:  
  
"Please send me all the documents referred to in your communications with the ICO investigation of my complaint (FS50302176).

According to the ICO you have explained the nature of the documents in the following paragraph:

'The information was about an export licence that was issued but, as it turns out, was subsequently returned to the Department for Business Innovation and Skills (BIS) unused.'

6. On 10 September 2010 the FCO responded stating that it considered that no information was held within the scope of the complainant's earlier request (made on 19 October 2009) but that information was held in respect of the current request. The FCO relied on sections 41, 40(2) and (3) of the Act to withhold the information held.

[http://www.ico.gov.uk/tools\\_and\\_resources/decision\\_notices.aspx](http://www.ico.gov.uk/tools_and_resources/decision_notices.aspx)

7. On 13 September 2010 the complainant requested an internal review of the FCO's decision.
8. On 11 October 2010 the FCO responded with its review which upheld the refusal notice based on the exemption found in section 41 of the Act.

## The Investigation

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### Scope of the case

9. On 1 November 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - The FCO has identified information about an unused export licence granted by BIS.
  - Although this licence does not confirm the existence of exports or the lack of them, the complainant considers that the existence of the licence contradicts court statements made by the directors of a named company. The complainant states:

“the directors have denied under oath ever even applying for such a licence to send anything to Israel directly or indirectly.”
  - The complainant believes the above to be evidence of “wrongdoing” by the directors of the named company even if no export occurred. As a result he concludes that the public interest in favour of disclosure of the requested information in this case outweighs any obligation of confidentiality to the directors.
10. The complainant also raised other issues that are not addressed in this notice because they are not requirements of Part 1 of the Act.
11. The Commissioner has not considered the application of sections 40(2) and (3) which were relied on by the FCO in the initial response but were not considered in the internal review. He has therefore restricted his investigation to the application of section 41.

### Chronology

12. On 28 January 2011 the FCO provided the Commissioner with a copy of the withheld information held by the FCO.
13. On 14 March 2011 the decision notice for the related case, reference FS50302176, was issued; in it the Commissioner found that information within the scope of the initial request of 19 October 2009 was held. The Commissioner notes that the withheld information in this (present) case is the same as that in the initial request. However, as this (present) case was already in progress at the time the decision notice was issued it ordered no steps to be taken.

14. Correspondence and telephone calls exchanged between the Commissioner and the FCO during the period 16 February 2011 and 8 June 2011 resulted in the Commissioner issuing an information notice to the FCO on 13 June 2011 requesting answers to the questions asked in his letter of 28 April 2011.
15. On 22 July 2011 the FCO responded.
16. On 27 July 2011 the complainant provided further information which he wished to be included in the consideration of this case.

## Analysis

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### Information held

17. The Commissioner has reviewed the information provided by the FCO which includes all the information it found during the searches undertaken.
18. The FCO has provided the Commissioner with details of the broad searches undertaken to ensure that any information within the scope of the request had been caught. Although the FCO had subsequently confirmed in the complainant's earlier case [reference FS50362176] that information about an export licence was held, given the outcome of the previous decision notice the Commissioner asked the FCO to make further searches of its databases and hard copies of information which could potentially hold other information within the broad scope of the request.
19. The Commissioner is satisfied that the FCO has thoroughly searched for any information it holds within the scope of the request.
20. The FCO has confirmed that it holds information falling within the scope of the complainant's request but has refused to disclose the information by relying on section 41 of the Act.

### Section 41 – Information provided in confidence

21. Section 41(1) provides for an exemption for information provided in confidence. However, section 41(1) will only apply if the information has been obtained by the public authority from another person and disclosure would constitute an actionable breach of confidence.
22. Having reviewed the withheld information the Commissioner finds that the information contained there is material to the export application process and was provided by the named company. Therefore the Commissioner is satisfied that the first element of the section 41

exemption has been met as this information was obtained from another person. The Commissioner wishes to stress that in this context "person" includes both natural persons and legal entities such as companies.

23. Whilst the actual document inspected by the Commissioner will not have been physically obtained from another person, it is clear that any information contained within the document which is material to the application, such as details of the exporter, the consignee and the goods were, and could only ever have been, provided by the exporter in the course of its application. In considering whether section 41 applies it is therefore important not to confuse the information that is being given with the format in which that information is held by the FCO. The Commissioner is satisfied that the withheld information that is material to an export licence application was obtained from another person.
24. Information obtained from another person will only engage the section 41 exemption if disclosure of that information would constitute a breach of confidence actionable by that or any other person. The test which the Commissioner considers appropriate for a breach of confidence in this case is set out in the case of *Coco v Clark*<sup>1</sup>. Under this test a breach of confidence will be actionable if:
- The information has the necessary quality of confidence;
  - The information was imparted in circumstances importing an obligation of confidence; and
  - There was an unauthorised use of the information to the detriment of the confider.

### **Necessary quality of confidence**

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

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

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

### **Obligation of confidence**

28. The Commissioner has gone on to consider whether the information was imparted in circumstances giving rise to an obligation of confidence. Whilst the FCO has said that information regarding export licences is provided to the government in confidence, it has not explained why the exporter believed that the information it was providing would remain confidential and the Commissioner is not aware of any explicit undertaking of confidentiality given by the public authority at the time the information was provided to it by BIS.
29. The complainant has alleged that a director of the exporter had suggested in police statements that the FOIA could be the means to discover information on the company's 'dealings'. The complainant further suggests that this 'apparent consent' undermines the arguments for the duty of confidence relied on by the FCO under section 41. The Commissioner's view is that the statement is open to different interpretations; 'apparent consent' is not sufficient to undermine the obligation of confidentiality.
30. The Commissioner has already considered a similar argument in his decision notice FS50180838 in respect of the complainant's case against the Department for Business, Enterprise and Regulatory Reform in December 2008. In that case the Commissioner concluded that the public authority's position, which was that the information was imparted in circumstances giving rise to an obligation of confidence, was not undermined as the result of a director's beliefs regarding the public availability of information. Similarly, in this case, the Commissioner's view is that when the information was provided to BIS the company would expect that the information would remain confidential.
31. In the case of *Coco v Clark* the judge suggested that in considering what constitutes a circumstance giving rise to an obligation of confidence the 'reasonable person' test may be useful:

*"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."*

32. The Commissioner has applied the 'reasonable person' test and is satisfied that it would be reasonable for the named company and the other named companies referred to in the information to expect that specific information about its licence application which relates to its commercial interests would not be disclosed. Therefore the Commissioner has found that the specific information regarding the export licence was provided to the public authority in circumstances that gave rise to an implied obligation of confidence.

### **Detriment to the confider**

33. The FCO did not provide specific examples of the detriment that would be caused to the company by the disclosure of the information it held as a result of its role in advising on export licences. However the FCO referred the Commissioner to the Tribunal in the Gibbons v ICO and BERR case of 2009 to rely on the outcome of that tribunal - which was to uphold the application of section 41- to indicate the potential detriment.
34. The Commissioner has concluded that if the information were disclosed the commercial interests of the named company would be compromised. This may put it at a competitive disadvantage and could damage its commercial relationships. The Commissioner is therefore satisfied that a detriment would be caused to the provider of the information were that information to be disclosed.

### **The public interest defence**

35. The Commissioner has found that all three elements of the test of confidence have been met. However it is necessary to consider whether there may be a public interest defence in disclosure.
36. Section 41 is an absolute exemption and therefore there is no public interest test to apply. However, under the common law of confidence there is a public interest defence to a claim of breach of confidence. The Information Tribunal described the effect of this in the case of *S v The Information Commissioner and the General Register Office*:
- "Disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential."*<sup>2</sup>
37. The Commissioner recognises that the test to be applied in deciding if a duty of confidence can be overridden differs from the public interest test normally applied under the Act. The public interest test normally

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

applied under the Act assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure. The duty of confidence public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.

38. 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.
39. The complainant has argued that disclosure of the information would serve the public interest as it would provide evidence of 'wrongdoing' by the director of the named company in a recent court case (Hove Crown Court in June 2010, R v Saibene and others), in stating that his company was only interested in the markets he could sell to and Israel was not one of them. The complainant explained his conclusions to the Commissioner as follows:

*"The existence of the licence shows the company have [sic] been interested in the export of its goods to Israel. It also shows they have been 'allowed' to get an export licence to export military goods to Israel."*
40. The complainant considers that the public interest in disclosure of the information held by the FCO should *"override the duties of confidence evoked by section 41 of the Act"*.
41. In addition, the Commissioner considers that there is also a more general public interest in the transparency of export licence arrangements especially with regard to the export of military goods.
42. However, the Commissioner recognises the wider public interest in preserving the principle of confidentiality, especially in the circumstances of this case. He believes that there is a strong public interest in the export licence application process operating effectively and ensuring that exporters who are subject to export controls properly co-operate and engage with government departments. If the confidentiality obligations were to be disregarded this would serve to undermine this process.
43. The Commissioner also believes that there is a public interest in avoiding detriment to the commercial interest of the confider, the named company, and the other named companies.



44. Having reviewed the withheld information and the arguments put forward by the complainant and the public authority, the Commissioner has concluded that there is a strong public interest in maintaining the obligation of confidence. The Commissioner has reached the view that the public interest in maintaining a duty of confidence outweighs the public interest in disclosure in this case. The Commissioner has returned to the Gibbons v ICO/BERR Tribunal (EA/2009/0002) and its finding that:

*'there would be no public interest defence to a common law action for breach of confidence were the disputed information to be disclosed'.*

45. In reaching his decision, the Commissioner concluded that although the withheld information is information on an export licence the specific information does not support the complainant's allegations. In the Commissioner's view this considerably weakens the case in respect of the public interest in disclosure. Consequently – and for the reasons set out in the preceding paragraphs – the Commissioner is satisfied that a public interest defence could not be established in this case..

## The Decision

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46. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

The public authority correctly withheld information relating to an export licence made by the named company under section 41(1) of the Act.

47. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority's response to the complainant did not comply with section 10(1) as it informed the complainant that information relevant to his request was held more than twenty working days after receipt of the request.
  - The public authority is also found to be in breach of section 17(1) in issuing a refusal notice more than twenty working days after receipt of the request.

## Steps Required

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48. The Commissioner requires no steps to be taken.

## Right of Appeal

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

Tel: 0300 1234504

Fax: 0116 249 4253

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

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

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 sent.

**Dated the 20<sup>th</sup> day of September 2011**

**Signed .....**

**Alexander Ganotis  
Group Manager – Complaints Resolution  
Information Commissioner’s Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### 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 of Request

#### **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."

### Personal information.

#### **Section 40(1) provides that –**

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

**Section 40(2) provides that –**

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1),  
and
- (b) either the first or the second condition below is satisfied.”

**Information provided in confidence.**

**Section 41(1) provides that –**

“Information is exempt information if-

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