



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0305V

Before

Judge Stephen Cragg Q.C.

and Tribunal Members

Ms. Kate Gaplevskaja
Mr Alf Murphy

Heard via the Cloud Video Platform on 10 March 2021

Between

DR EMMA BRIANT

Appellant

and

(1) INFORMATION COMMISSIONER

(2) MINISTRY OF DEFENCE

Respondents

The Appellant was represented by Ms Aileen McColgan QC

The Commissioner was not represented

The Ministry of Defence was represented by Ms Jennifer Thelen

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties represented joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The Tribunal considered an agreed open bundle of evidence comprising 289 pages, a closed bundle and skeleton arguments, and an authorities bundle.

PRELIMINARY MATTER

4. In this case there is CLOSED bundle about which the Registrar has already made the appropriate rule 14(6) application (rule 14(6) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009) on 23 February 2021 (page A45 of the bundle). The Ministry of Defence (MOD) has filed a CLOSED version of its skeleton argument and has applied for a similar direction in relation to certain redacted paragraphs of the document.
5. Having perused the document the Tribunal is satisfied that disclosure of the redacted parts of the document will prematurely undermine the position of NCND or otherwise defeat a purpose of the appeal.
6. The redacted parts of the document will be held, pursuant to rule 14(6), on the basis that they will not be disclosed to anyone except the Information Commissioner and the Ministry of Defence. It is also necessary for the Tribunal to have sight of the redacted parts of the document, to assess the merits of appeal in light of the MOD's submissions about the need for NCND to remain.

BACKGROUND

7. The Appellant submitted the following request to the MOD on 21 August 2019:

‘Under the FOI Act I am writing please to request a copy of a final project report for a research and communication campaign in Ukraine to win back control of Donetsk undertaken by Strategic Communication Laboratories (SCL) - this may not be a UK campaign but the report was shared with the MoD. I would appreciate seeing the report as well as any associated communications and a list of any meetings about this specific project and related outcomes or proposals, as well as people involved please (period of interest - 2014-15).’
8. The MOD responded on 19 September 2019 and explained that it considered the exemptions contained at sections 26(3) (defence) FOIA and 27(4) (international relations) FOIA to apply, but it needed additional time to consider the balance of the public interest.
9. The MOD provided the Appellant with a substantive response to her request on 24 September 2019. This response confirmed the MOD’s position that sections 26(3) and 27(4) FOIA provided a basis to refuse to confirm or deny whether it held the requested information and that in all of the circumstances of the case the public interest favoured maintaining both exemptions.
10. The Appellant contacted the MOD on 25 September 2019 and asked it to conduct an internal review of this response. The MOD upheld this position in an internal review issued on 23 October 2019.

THE LAW

11. Under section 1(1)(a) FOIA: -

1(1)(a) Any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, ...
12. Section 2(1)(b) FOIA provides that the duty to confirm or deny does not apply where a qualified exemption is engaged and the public interest in maintaining it is outweighed

by the public interest in disclosing whether or not the public authority holds the information:-

2(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—

...

(b) 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, section 1(1)(a) does not apply.

13. By section 2(3) FOIA, section 27 is defined as a qualified exemption by its exclusion from the list of absolute exemptions. Section 17(4) FOIA provides that a public authority is not required to state why an exemption to the duty to confirm or deny whether it holds the information applies in certain circumstances: -

17(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

14. Section 27 FOIA provides an exception to the duty to make disclosure of the information for international relations. It reads, materially, as follows: -

27 (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) relations between the United Kingdom and any other State,

(b) ...

(c) ...

(d) ...

(2)

(3) ...

(4) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)—

(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or

(b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

15. Thus, section 27(4) FOIA provides an exemption against complying with section 1(1)(a) FOIA – confirming or denying whether requested information is held – if to do so would, or would be likely to, prejudice the interests protected by section 27(1). In the circumstances of this case the relevant interest is that contained at section 27(1)(a), namely relations between the UK and any other state.
16. In order for the prejudice-based exemption in section 27 FOIA to be engaged, three criteria must be met by the MOD.
17. First, the actual harm which the MOD alleges would, or would be likely to, occur if it confirmed whether or not it withheld information has to relate to the applicable interests within the relevant exemption. Second, the MOD must be able to demonstrate that some causal relationship exists between the confirmation or denial of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice, which is alleged must be real, actual or of substance. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the MOD is met, namely that confirmation or denial ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice.
18. In relation to the lower threshold (‘would be likely’) the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, this places a stronger evidential burden on the MOD. The anticipated prejudice must be more likely than not to occur.

THE DECISION NOTICE

19. The Appellant complained to the Commissioner who investigated and issued a decision notice dated 19 August 2020.

20. The Commissioner set out the MOD's position. Essentially, the MOD argued that confirming or denying whether it held the information sought by the request would be likely to harm the UK's relationship with the Ukraine.
21. The MOD explained that confirming whether or not the requested information was held would reveal whether or not there was an interest in the Donetsk region from the UK government. The MOD emphasised the importance of building and maintaining good, effective and stable international relationships. The Commissioner also stated that the MOD had provided her with more detailed submissions to support its reliance on section 27(4) of FOIA. However, because the MOD considered that section 17(4) FOIA applied to these submissions, the Commissioner did not include them in the decision notice.
22. The Commissioner recorded the Appellant's position that simply confirming whether or not the requested information is held would not jeopardise the national security of the UK or its allies. She pointed out that the report was about events in the past and would not endanger current operations. She argued that the blanket position adopted by the MOD was censorship and an abuse of these exemptions. She was of the view that confirming whether or not the information was held would not expose any specific methods contained in the report. She did not think that the information was classified and that SCL were showing the report to students at their NATO training courses, and also to military personnel who were not British or Ukrainian. The Appellant referred to a response that the Foreign and Commonwealth Office (FCO) had issued in relation to a similar request. She argued that in light of the FCO's response the MOD should reconsider its 'neither confirm nor deny' (NCND) position.
23. With reference to the various tests set out above the Commissioner concluded as follows:

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20. With regard to the first criterion, the Commissioner accepts that the potential prejudice described by the MOD clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect. With regard to the second criterion the Commissioner is satisfied that there is a causal link between the MOD confirming whether or not it holds the requested information and harm occurring to the UK's relations with Ukraine. Furthermore, in relation to the third criterion, she is satisfied that this likelihood of this prejudice occurring is one that is more than hypothetical; rather there is a real and significant risk. Section 27(4) is therefore engaged.

24. The Commissioner stated that she could not explain why she had reached her conclusion in relation to the second and third criteria without referring directly to the MOD's submissions, which the MOD considered to be covered by section 17(4) FOIA. The Commissioner said that she appreciated that that was likely to prove frustrating to the complainant.

25. The Commissioner also considered the point raised that a similar request had been addressed by the FCO. She said that she was not persuaded that this undermined the MOD's reliance on section 27(4) FOIA in relation to the current request for two reasons:

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23. Firstly, although the FCO disclosed a heavily redacted digest of information in response to the request it received, its refusal notice accompanying that disclosure refused to confirm or deny whether it held any information on the basis of the exemptions contained at sections 26(3) and 27(4) of FOIA. The Commissioner notes that this request has not yet been the subject of an internal review.

24. Secondly, the role of the Commissioner in assessing section 50 complaints made to her under FOIA is limited to considering the circumstances as they existed at the time that the request was submitted to the public authority. In this case, the complainant submitted her request to the MOD in August 2019. The FCO's response was issued in February 2020, in response to a request submitted to it in December 2019.

26. In relation to the public interest test, the Commissioner concluded that: -

29. The Commissioner agrees that there is a significant public interest in the UK government being transparent about its relationship with SCL in light of the widely reported allegations concerning Cambridge Analytica. Confirmation as to whether or not the MOD held the requested information would directly contribute to this interest. Furthermore, confirmation as to whether or not the information is held could potentially provide the public with some insight into the UK government's approach to its dealings with the Ukraine. In the Commissioner's view in light of the Cambridge Analytica case she accepts that the public interest in confirming whether or not the information is held should in no way be underestimated.

30. However, the Commissioner also accepts that there is a weighty public interest in ensuring that the UK's relations with the Ukraine are not damaged. Having taken into account the submissions provided to her by the MOD she has concluded that in the circumstances of this case these interests are more compelling. Therefore, the Commissioner has concluded that, by a relatively narrow margin, the public interest in maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held. Again, the Commissioner cannot elaborate on

her reasons for this conclusion without disclosing information which is itself considered to be sensitive.

27. Having so found, the Commissioner did not go on to consider the reliance on s26(3) FOIA. We refer to this further below at paragraphs 64-65.

THE APPEAL

28. The Appellant's appeal is dated 6 November 2020. The Appellant disputes the conclusion reached by the Commissioner in relation to the application of s27(4) FOIA exemption, given the information available in the public domain, and because of disclosure in other situations: -

This conclusion is undermined by the fact that the report I sought was (as I informed the IC by email of 23 June 2020) shared by SCL with students at their NATO training courses, which were not classified, and with military personnel who were neither British nor Ukrainian nor even part of NATO (Finland). It is further undermined by the fact of the FCO's (limited) disclosure of similar evidence as well as by all the evidence referred to above of the fact that the UK's relations with Ukraine have been placed in the public domain.

29. The Appellant also disputed the conclusion reached in relation to the public interest balance. The Appellant also argued that the Commissioner erred in failing to exercise her discretion to require evidence from the MOD in regard to the FCO response to the Appellant's request to the FCO, and in regard to the Appellant's assertion that SCL had been sharing the report with its students at its NATO training courses and with military personnel who were neither British nor Ukrainian, but Finnish and not even members of NATO.

30. As the Appellant explains in her skeleton argument: -

4. What is at issue for this Tribunal is not whether the Second Respondent should provide the Appellant with the information she seeks, simply whether it should tell her whether or not it holds that information. As set out below, the Second Respondent's submissions and witness evidence at times stray into seeking to persuade the Tribunal by reference to damage which, even on the Second Respondent's case, might be attributable to the release of the information, but not to the mere confirmation or denial of its existence.

5. The law is not in dispute between the parties. What is in dispute is whether the First and Second Respondents were correct in their assessment of the harm

which might be done were the Second Respondent to confirm whether or not it is in possession of the information whose disclosure the Appellant eventually seeks.

28. The Appellant's skeleton argument outlines her main points: -

10.1. the request made to the [MOD] did not assume any involvement by the [MOD] in the activities to which the report sought related, and so the [MOD's] confirmation or denial that it possessed the report could have conveyed only the most limited information about the UK's involvement or interest in Ukraine;

10.2. the UK's involvement in Ukraine, and in the region of Eastern Ukraine in which Donetsk is located, has been a matter of public knowledge since at least February 2015;

10.3. the training during which the report was employed by SCL, and which is referred to by the Second Respondent as having been "conducted in a confidential and secure environment", was not characterised by the degree of security that the [MOD] claims; and

10.4. the disclosure of (albeit redacted) information by the FCO (now FCDO) demonstrates that neither ss26(3) nor 27(4) justified the NCND response in this case.

31. In relation to 10.1, the Appellant noted that her request had stated that the report requested may not relate to a UK campaign and therefore confirming or denying whether it existed, in itself, would not impact on the UK's relations with Ukraine and/or with defence matters.

32. In relation to 10.2 the Appellant pointed to a number of public documents in 2015 in which it was stated that British military personnel and other personnel had been sent to or were involved in Ukraine. More recent press reports were also cited which indicated UK involvement in Ukraine including a UK government press release in June 2020 which stated that: -

The UK already has a close relationship with Ukraine, where our soldiers have trained over 18,000 personnel, but we now look forward to deepening that cooperation on NATO exercises and operations. We will all benefit from closer association and increased interoperability - NATO is fortunate to have such a partner. The UK currently has personnel deployed on Operation Orbital, which is the UK's training mission to Ukraine, established in 2015 following the illegal annexation of Crimea by Russia a year earlier. It is a demonstration of the UK's

unwavering commitment to Ukraine's independence, territorial integrity and sovereignty. Since 2015, UK personnel have trained over 18,000 members of the Ukraine Armed Forces, making a real difference and saving lives. It was extended by three years to March 2023 by Defence Secretary Ben Wallace in November 2019.

33. In relation to point 10.3 the Appellant pointed to evidence that the report in issue was shared by SCL with students at their NATO training courses, which were not classified, and with military personnel who were neither British nor Ukrainian nor part of NATO, and so confirming the existence or otherwise of the report was not as high risk as the MOD claimed. The evidence is in the Appellant's witness statement where she says that she has conducted interviews with individuals with direct knowledge of the report being used in NATO workshops, as part of her research for an upcoming book. She says that this information was shared to aid her research and she does not feel able to share the identity of the individuals involved.
34. The Appellant states that the SCL workshops were not secure and that the report was shared at a workshop in Riga, Latvia and that the phishing of SCL "revealed past assistance provided by the UK and training being provided to Ukraine by SCL/IOTA Global." In addition the Appellant said that SCL had referred to its 2014 work in Donetsk on its website, stating that it had been "contracted to collect population data, conduct analytics, and deliver a data-driven strategy for the Ukrainian government in pursuit of their goal to win back control of Donetsk". This reference was posted on the website as late as 2018 and remains available in the internet archive – there is a document in the bundle reflecting this. The SCL Donetsk project was also reported on by the BBC in March 2018, and a link provided to SCL's website. The Appellant's case is that these documents and web-site pages would have meant that it would be assumed that the MOD did hold the report in any event, SCL having stated that it had been shared with the MOD, and no adverse effect had been noted as a result.
35. In relation to point 10.4, the Appellant points out that the FCO has disclosed redacted information relating to IOTA Global which is part of the SCL group, which at least showed that the existence of relevant information can be acknowledged by the MOD. The Appellant's skeleton argument concludes that, as regards the [MOD's] argument that ss26(3) and 27(4) FOIA, properly applied, preclude the issue

of a confirmation or denial in this case, the Appellant submits that the acceptance of this would, on the evidence and submissions shared with her, involve placing far too low a bar for reliance on those provisions:-

It is clear from the information already in the public domain, for example, that “there was an interest in the Donetsk region by from the UK government at the relevant time”. The fact that “neither the UK nor the Ukrainian Governments have provided any official comment as to whether the armed forces of either country held a report of the kind requested here” cannot indicate that the confirmation or denial of the existence of a report would cause prejudice to UK-Ukraine relations . And the statement ...that confirming or denying the existence of the report “could also have negative implications for the UK’s relationships with other countries and regions where the UK Government has been, or is, involved in defence engagement activities” invites astonishing over-reach of the s27(4) defence, as does ...[the MOD’s] Submissions in relation to the s26(3) defence, and would permit the UK to adopt a much less transparent approach in this context than its international partners...

36. The MOD’s submissions in OPEN can be summarised as follows: -

- (a) Confirming or denying whether the information is held would reveal whether or not there was an interest in the Donetsk region by the UK government at the relevant time, which is different from the later (2018) Joint Statement acknowledging co-operation.
- (b) That later acknowledgement did not contain details about specific campaigns or activities, and neither the UK government nor the Ukraine government had provided official comment on whether the armed forces of either country hold a report of the kind requested.
- (c) The information sought pre-dates the 2018 Joint Statement, and the later agreement does not mean that the earlier nature of the MOD’s relationship with Ukraine should be disclosed, and such disclosure could have negative impacts on the UK’s relationships with other countries.
- (d) The MOD considers there is a real risk of interference with the relationship between the UK and the Ukraine, which would prejudice the Government’s ability to maintain a good, effective and stable relationship.

37. In relation to specific points made by the Appellant, the MOD responded as follows:

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- (a) The Appellant's points about a number of public pieces of information available fail to distinguish between generic and specific information, disclosure to a small group and to the public at large, and between statements made which purport to be about the MOD rather than statements from it.
- (b) It is not accepted that the alleged sharing of the information at a NATO course means that any report is not sensitive, and that prejudice would not be caused if the MOD confirmed or denied whether it held the report. Any sharing on a NATO course says nothing about whether the MOD holds the report. The NATO course was conducted in a secure and confidential environment, and any disclosure would have been to a small group and not to the public at large as happens under FOIA. The fact that an entity involved in the course was subject to phishing does not mean that the course was not secure and confidential.
- (c) The information on the SCL website which says that the information has been shared with the MOD does not constitute official confirmation that the information is held by the MOD.
- (d) The information disclosed by the FCO in another request involving IOTA Global said nothing about the information sought in this request and whether it is held by the MOD, or whether the information sought has entered the public domain.
- (e) The publicly available information to which the Appellant refers demonstrates that the UK government has committed to a programme of providing support and assistance to the Ukrainian Armed Forces and its Ministry of Defence, but at a level of generality which does not encroach on the interests which the MOD wished to protect by relying on NCND to respond to the requests.

38. The MOD relied upon these arguments, and those set out in the closed documents, to argue that the balance of the public interest also favoured the MOD relying on NCND in relation to the information sought.
39. There was additional information in the MOD's CLOSED written submissions which we will refer to in a closed annex to this decision.

THE HEARING

40. At the hearing, the Tribunal heard from Ms Aileen McColgan QC for the Appellant and Ms Jennifer Thelen for the MOD and we are grateful for the helpful written and oral submissions from both counsels. The Commissioner was not represented but relied on written submissions which supported the decision notice.
41. The Tribunal heard evidence in open and closed session from Mr David Stevens who is Assistant Head for Strategic Messaging at the MOD, and who has been a civil servant in the MOD since 1988. His responsibilities include providing advice on, and the coordination of, communications activities conducted overseas by the UK armed forces on operations in support of allied and partner nations. Mr Stevens provided a witness statement dated 19 February 2021, of which there was also a CLOSED version available to the Tribunal.
42. The OPEN parts of his witness statement re-iterate the submissions made by the MOD and included the following amplifications which will be understood in the context of what has been set out above: -

Not all partner nations are willing to disclose publicly such assistance, since it can undermine the effectiveness of the communications they are seeking to improve if they can be portrayed as being subject to external advice and influence. Equally, state and non-state competitors and adversaries of the UK take a keen interest in understanding how the UK undertakes communications activity overseas to support our national security interests and those of our allies and partners, and these competitors and adversaries seek to use such information to undermine or misrepresent to their own ends the aforementioned communications activity.

...SCL but never its subsidiary Cambridge Analytica, was contracted by the MOD on a limited number of occasions prior to 2018, principally in the period 2009-14.... SCL achieved very significant public prominence in 2018 when its

subsidiary, Cambridge Analytica was heavily involved in the controversy surrounding the use of social media data from Facebook, used for political campaigning purposes. This public profile inspired substantial interest in any past work by SCL or its subsidiaries for the UK, of which the Appellant's FOI request formed part.

Cooperation between the UK and Ukraine, and between the UK and other states, requires Ukraine, and other states, to trust the UK. Specifically, this includes trusting that the MOD will not comment on the confidential military tactics and capabilities of its allies, either by confirming or denying the MOD's knowledge, or lack thereof, of the use of a particular tactic or capability or the provision of military assistance...

The relationship between the UK and Ukrainian governments has only been made public in the most general sense. Some areas of cooperation are not detailed in public where the provision of too much detail might allow hostile actors to interfere or misrepresent the nature of the relationship or undermine its operational effectiveness. For example, whilst the Joint Statement sets out that the two countries will cooperate on "cyber, hybrid defence and defence intelligence," no further details of these highly sensitive areas are given...

I note that the Appellant believes that a document, matching the description of the information she has requested, has been used as part of a strategic communications training course delivered at the NATO School in Oberammergau.... First, this course... is not commissioned by the UK, nor is the UK consulted as to its content or provision. Further, the MOD has not been consulted on or authorised the use of any MOD owned strategic communications material on such courses. The alleged use in this manner of a putative document, whether or not it is as it is alleged to be, therefore does not alter the MOD's assessment of the potential detriment that would result were the MOD to either confirm or deny the existence of the requested information, since it would be the formal attribution of any such information to the UK, which would pose the risk of harm. Thus, here, confirmation – one way or another – has a real value. Finally, and importantly, reference to an alleged report, on its own, says nothing about the MOD's involvement in such a report, if any.

The Appellant additionally makes reference in her grounds of appeal to a statement that appeared on the now defunct SCL website, which declared that the company had conducted research on behalf of the Ukrainian Government in Donetsk...The statement by SCL was made without the knowledge of the MOD. It is recognised that, particularly following the controversy surrounding Cambridge Analytica, there is legitimate public interest in whether the UK had previously engaged companies from the SCL family of corporate entities to conduct research or communications activities. This is why the MOD has previously disclosed that contracts have been awarded to SCL.

43. In relation to the public interest question, Mr Stevens commented that: -

.... taking these issues into account, the public interest in the disclosure sought here, while plainly valid, does not outweigh the prejudice which would be likely to arise. I am of the firm judgement that the potential impact this disclosure would be likely to have on our relationship with Ukraine and other states, and the manner in which such information is likely to be exploited and manipulated by hostile actors to the mutual detriment of both the UK and Ukraine, is such that the public interest in neither confirming nor denying that the information sought is held outweighs the public interest in further disclosure.

44. During the hearing Mr Stevens was questioned about the contents of his statement. He maintained his position that the documents relied upon by the Appellant, which included press releases and official statements did not go to the question as to whether the MOD held a copy of the report and were more generic documents reflecting the support given to the Ukraine by the UK government and armed forces.
45. He accepted that there has been concerning leaks, and concerns about what had been done with leaked documents, but again re-iterated that this did not directly impact on the question as to whether the MOD held a copy of the report or not. He explained that this was a precise question: if a positive answer was given this would confirm the claim made on the SCL website which was not the MOD responsibility. If a negative answer was given, then this could give information about who a report had been shared with and who precisely SCL had been working for. There was a concern about mosaic disclosure where different information could be put together to form a greater whole.
46. As parts of his witness statement had not been disclosed, the Tribunal held a CLOSED session with Mr Stevens to question him further about these issues and the additional facts and arguments relied upon by the MOD. Ms Thelen also made some short submissions in the CLOSED session, before we heard submissions in OPEN from Ms McColgan and Ms Thelen based on the points made in their respective skeleton arguments.

DISCUSSION

47. We are in the same position as the Commissioner, and we are unable to give our full reasons in an OPEN judgment. Our conclusions are, by necessity, buttressed by the contents of a CLOSED annex to this decision.
48. We recognise the emphasis placed by the Appellant in this matter on the fact that we are considering not whether information should be disclosed, but whether the MOD should be entitled to NCND whether it holds the information. We also recognise that the ability to NCND is to protect a public authority from the drawing of inferences which would cause the same kind of prejudice as disclosure of the exempt information.
49. We bear in mind all the points the Appellant has made about the information that is said to be in the public domain already by various methods (whether it be by press reports, possible usage in NATO training courses, on the SCL website, or disclosure in relation to other FOIA requests). The main submission is that a culmination of these events means that the MOD neither confirming or denying whether it holds this information does not recognise the reality of the situation that it must be known or at least implied that the MOD holds a copy of the report requested, and therefore prejudice to relations between the United Kingdom and the Ukraine, would not, or would not be likely to, occur if the MOD confirmed whether or not it held the information requested.
50. However, we accept the evidence of Mr Stevens (as set out above) that none of the documentation available (which we have considered for ourselves) goes far enough to support that conclusion. We accept that the press reports referred to relate more generally to the relationship between the UK and the Ukraine and not specifically to the existence of a report or whether it is held by the MOD. The Joint Statement of 2018 does not relate to the previous period with which the Appellant is interested. Whether or not the report was used in NATO training courses amounting to limited disclosure does not show that the MOD holds a copy of the report and does not amount to an official confirmation to the world at large that that is the case. As UTJ Markus QC said in the recent case of *Commissioner of the Police of the Metropolis v (1) Information Commissioner and (2) Martin Rosenbaum* [2021] UKUT 5 (AAC):-

55. Official confirmation adds something to other information in the public domain, even if that is credible information provided by third parties who are well-placed to provide that information.

51. In fact, in relation to the NATO courses we do not know whether the sources are credible. For understandable reasons, the Appellant does not wish to divulge the identity of those who have provided her with information, but that does mean we are unable to form any decided view on this issue in the Tribunal.

52. Likewise, simply because SCL says on its website that it has shared a report with the MOD does not amount to official confirmation that the MOD holds the report, or even that the SCL website is right about this issue.

53. We also accept that the information disclosed by the FCO does not throw any light on whether the MOD does, in fact hold the requested information.

54. We agree with the FTT in *Gilby v IC and FCO* (22 October 2008) EA/2007/0071 when it stated that: -

23...prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage.

55. In summary, the matters referred to by the Appellant do not, in our view, undermine the MOD's case about prejudice or likely prejudice in the way claimed by the Appellant. In relation to the prejudice, or likely prejudice claimed, we rely on the evidence on this issue given by Mr Stevens in OPEN, but also the additional factors he has referred to in the CLOSED part of his statement, which we consider in the Annex to this decision.

56. Thus, taking all the evidence into account, we accept that the potential prejudice described by the MOD clearly relates to the interests which the exemption contained at section 27(1)(a) FOIA is designed to protect. We are satisfied, as was the Commissioner, that there is a causal link between the MOD confirming whether or not it holds the requested information and harm occurring to the UK's relations with the Ukraine.

57. Our view is that the actual harm which the MOD alleges, namely prejudice to relations between the United Kingdom and the Ukraine, would, or would be likely to, occur if it confirmed whether or not it held the information requested. We are also satisfied that the likelihood of this prejudice occurring is one that is more than hypothetical, that there is a real and significant risk that confirming or denying whether it held the information sought by the request would be likely to harm the UK's relationship with Ukraine, and therefore section 27(4) FOIA is engaged. Our reasons for reaching these conclusions are supported by the material set out in the annex.

58. The Tribunal must consider the public interest test contained in section 2 FOIA and whether the public interest in upholding the exemption outweighs the public interest in confirming whether or not the requested information is held. It is clear that the Appellant has strong public interest arguments which support the MOD confirming or denying whether it holds the information, and that transparency in relation to the document is important. She has suggested that the report may have been a prototype for what became Cambridge Analytica's big data methodology but used in Ukraine. As the Commissioner put it, the Appellant: -

...argued that later allegations regarding electoral and data abuse by Cambridge Analytica, not simply in the UK, but also worldwide, allied to the fact that the requested report shaped policy on Ukraine, meant that it was essential that the public are able to understand the company's role and, in broad terms, what it did.

59. We agree with the Commissioner that there is a strong public interest in openness, transparency and public accountability, and in the UK government's dealings with the SCL Group. We also agree with the Commissioner that confirming whether or not information was held would provide a greater understanding of the nature and extent of the UK's commercial dealings with the company.

60. The public interest factors relied upon by the MOD to resist having to confirm or deny that the information is held have mostly been listed above at paragraph 41-42 and include that it would reveal whether or not there was an interest in the Donetsk region by the UK government at the relevant time, that disclosure could have negative impacts on the UK's relationships with other countries, and a real risk of

interference with the relationship between the UK and the Ukraine, which would prejudice the Government's ability to maintain a good, effective and stable relationship.

61. There are additional reasons which we will refer to in the CLOSED annex. Having taken into account the submissions provided by the MOD, and having evidence from Mr Stevens in both OPEN and CLOSED sessions (and read his OPEN and CLOSED witness statements), we are of the view that the public interests put forward by the MOD outweigh the public reasons in favour of disclosure.
62. We would note that the Commissioner said she also reached this conclusion, but by a relatively narrow margin. We would comment that having had the benefit of hearing evidence from Mr Stevens we are satisfied to a greater margin than was the Commissioner that the public interest favours non-disclosure in this case.
63. The MOD is therefore entitled to rely on section 27(4) FOIA to refuse to confirm or deny whether it holds the requested information.
64. We note that the Commissioner did not go on to consider the MOD's reliance on section 26(3) FOIA. The relevant parts of s26(3) FOIA read as follows: -

26.— Defence.

- (1) 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.
- (2) In subsection (1)(b) "*relevant forces*" means —
 - (a) the armed forces of the Crown, and
 - (b) any forces co-operating with those forces,or any part of any of those forces.
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with [section 1\(1\)\(a\)](#) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

65. We also note the advice in as to how we should proceed in such circumstances from the UT in *IC v Malnick* [2018] UKUT 72 (ACC): -

109...If the FTT agrees with the Commissioner's conclusion regarding E1, it need not also consider whether E2 applies. However it would be open to the FTT to consider whether E2 applies, either by giving its decision on the appeal in the alternative (e.g. E1 applies but, if that is wrong, E2 applies in any event) or by way of observation in order to assist the parties in assessing the prospects of appeal or, in the event of an appeal to the Upper Tribunal, so that that Tribunal has the benefit of consideration of all exemptions which may be in play including relevant findings of fact. It is a matter for the FTT as to how it approaches such matters, taking into account all relevant considerations including the overriding objective.

66. We would simply say that in our view the same factors as set out above would apply in the application of the exemption under s26(3) FOIA. In this case the MOD relied on the criterion in s26(1)(b) FOIA which relates to 'the capability, effectiveness or security of any relevant forces. Section 27(4) and 26(3) FOIA are inextricably intertwined – the effectiveness of the Armed Forces in question here is their ability, through defence engagement and cooperative capability development, to protect and project UK interests overseas, and promote better and more effective international relationships with allies and partners such as Ukraine.

67. For all those reasons, and those set out in the CLOSED Annex, this appeal is dismissed.

STEPHEN CRAGG QC

Judge of the First-tier Tribunal

Date: 26 May 2021.

