

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 3 March 2011**

**Public Authority:** The National Archives  
**Address:** Kew  
Richmond  
Surrey  
TW9 4DU

### Summary

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The complainant made a request to the National Archives for information held in two files relating to arms sales with Saudi Arabia. In response the National Archives disclosed a quantity of information falling within the scope of the request. However, some information was withheld under the exemptions in sections 27(1) and 27(2) (International relations) of the Act. The Commissioner has investigated the complaint and has found that the exemptions were engaged in respect of all of the withheld information and that for most of the information the public interest in maintaining the exemption outweighed the public interest in disclosure. However, for a particular category of information the Commissioner found that the public interest balance weighed in favour of disclosure. The Commissioner now requires the National Archives to make this information available to the complainant within 35 calendar days of the date of this notice. The Commissioner also recorded procedural breaches of section 1(1)(b) (General right of access) and section 10(1) (Time for compliance) of 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 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

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2. On 22 May 2009 the complainant contacted the public authority to request access to the files DEFE68/133 and DEFE68/136.
3. The public authority acknowledged the request on 25 June 2009 when it informed the complainant that it could not yet say if the files could be opened. It explained that it had to consult a number of government departments in relation to the request and that it had an extra 10 working days to respond to the request as provided for in the Freedom of Information (Time for Compliance with Request) Regulations 2004.
4. The public authority issued a further response on 7 July 2009. It now stated that some of the requested information was covered by the exemption in section 27(1) which exempts information which if released could put at risk relations between the United Kingdom and any other state, or the interests of the United Kingdom abroad or the United Kingdom's ability to promote or protect its interests. Section 27(2) was also engaged which exempts information if it is confidential information obtained from a State other than the UK. The public authority explained that as these are qualified exemptions it needed to consider whether the public interest favoured disclosing the information. It said that it would let the complainant know the outcome of this public interest test by 4 August 2009.
5. The public authority responded substantively on 2 September 2009. It confirmed that for some of the information contained within the two files requested by the complainant it had concluded that the public interest in maintaining the exemption in section 27(1) and section 27(2) of the Act outweighed the public interest in disclosure. It outlined for the complainant the factors it had taken into account when balancing the public interest. However, it also said that, in consultation with the Ministry of Defence, it had decided that redacted versions of the information contained within the two files could be disclosed. It explained that this information would be available for public viewing from 9 September 2009.
6. The complainant subsequently asked the public authority to carry out an internal review of its handling of the request. The request for review was received on 8 October 2009. In particular the complainant said that she had arranged for a friend to view the files at the public authority but this person had found that only one of the files was available. The other file (DEFE68/133) had apparently been recalled by the Ministry of Defence and was not available. The complainant also

questioned the level of redactions that had been made to the file, DEFE68/136.

7. The public authority presented the findings of its internal review on 4 December 2009. It now said that it was satisfied that all processes surrounding the handling of the request took place properly. It also said that it was upholding the decision to refuse to disclose some of the requested information from both files under section 27(1) and section 27(2) of the Act. Responding to the complainant's concerns about the level of redactions made to the information, it said that it was satisfied that the withheld information had been redacted at an appropriate level and that the pages had only been withheld in their entirety where necessary. As regards the complainant's problems in accessing one of the files, the public authority apologised and explained that steps had been taken to address the issues raised. The file was subsequently made available, subject to redactions, and so this issue is not covered in this decision notice.

## **The Investigation**

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### **Scope of the case**

8. On 19 January 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to withhold requested information from both files under section 27(1) and section 27(2). In doing so the complainant referred the Commissioner to a previous decision of the Information Tribunal in support of her position that the level at which information had been redacted was inappropriate and also suggested that some of the information which had been withheld was already publicly available in other files held by the public authority.

### **Chronology**

9. The Commissioner first contacted the public authority with details of the complaint on 22 February 2010 and asked for copies of the withheld information.
10. The public authority responded to the Commissioner on 17 March 2010. It said that it could not provide copies of the information at this time. It explained that the withheld information comprised of two closed items extracted from open parent files which were voluminous and contained restricted information. It agreed that it would discuss

the most appropriate way for the Commissioner to view the information once the complaint had been allocated to one of the Commissioner's case officers. The public authority did however provide a detailed submission to support its handling of the request.

11. The Commissioner wrote to the public authority again on 16 August 2010, after the appointment of a case officer. The Commissioner now asked for copies of the withheld information to be sent to him, clearly marked to show where any exemption(s) was being applied. The Commissioner also asked for further information on the application of section 27(1) and 27(2). In particular the Commissioner asked the public authority to confirm which particular sub-sections of the exemption it was relying on. The Commissioner also noted that the public authority had sought to argue that disclosure of the information would not be welcomed by Saudi Arabia and would provoke a negative reaction on their part which would prejudice relations between the two countries. In order that he could consider the public interest in maintaining this exemption the Commissioner asked for further details on the nature and importance of the current relationship between the UK and Saudi Arabia.
12. The complainant had argued that some of the information which had been redacted from the files was in fact publicly available in open files held by the public authority. Furthermore, it was alleged that some of this information included disparaging references to members of the Saudi Royal Family. The complainant contended that there was no evidence that this information had prejudiced relations with Saudi Arabia in the years in which it had been in the public domain. The Commissioner asked for the public authority's comments on this point and invited it to make any additional representations in support of its handling of the request.
13. Copies of the withheld information were received by the Commissioner on 20 September 2010. At this point the public authority also confirmed that the specific exemptions it was applying were sections 27(1)(a), (c), (d) and 27(2). The Commissioner was referred to the Ministry of Defence for further details on relations between the UK and Saudi Arabia. The Commissioner wrote to the Ministry of Defence on 17 September 2010 to request this information.
14. The Ministry of Defence provided the Commissioner with further details on relations between the two countries on 23 September 2010.

## Analysis

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15. A full text of the relevant statutory provisions referred to in this section is contained within the legal annex.

## Exemptions

### Section 27 – International relations

16. The two files requested by the complainant relate to arms sales by British companies to the Kingdom of Saudi Arabia (KSA). The first file (DEFE 68/133) contains information from January 1971 to December 1972 which relates to negotiations regarding the Saudi Arabian Air Defence Programme (SAADP) and the three British companies contracted to deliver the programme – British Aircraft Corporation, Marconi and Airwork. The file also contains information concerning possible sales to the Saudi National Guard.
17. The second file (DEFE 68/136) dates from January 1968 to December 1968 and deals with the follow up to the Saudi decision not to renew a contract for training and maintenance of Royal Saudi Air Force aircraft with the British firm Airwork. It also records attempts to help the Royal Saudi Navy identify their strategic objective and what equipment it would need to achieve this.
18. Whole documents from the files have been withheld by the public authority and elsewhere certain extracts from some documents have also been redacted. The public authority has confirmed that it is relying on section 27(1)(a), 27(1)(c), 27(1)(d) and 27(2) to withhold this information. The Commissioner has dealt with the exemptions within section 27(1) together as the reasons advanced by the public authority as to why the exemptions are engaged are essentially the same.
19. The Commissioner would point out that in reaching his decision on this case he has been guided very strongly by the findings of the Information Tribunal in *Gilby v Information Commissioner*<sup>1</sup>. That case concerned a request made to the same public authority for information of a similar nature to the information in this case, held in former Foreign and Commonwealth Office files. The Commissioner considers that many of the Tribunal's findings apply equally to this case.

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<sup>1</sup> *Gilby v Information Commissioner and Foreign & Commonwealth Office* [EA/2007/0071 & 0078 & 0079]

## Section 27(1)

20. So far as is relevant section 27(1) provides that information is exempt if its disclosure would, or would be likely to, prejudice:

- (a) relations between the United Kingdom and any other State,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.

21. The public authority has argued that the exemptions within section 27(1) are engaged because disclosure would be likely to damage relations with the KSA and have an adverse effect on future contracts with that country. It explained that the information includes unfavourable references to members of the Saudi Royal Family and other prominent individuals within Saudi Arabia at that time. It also includes references to contractual negotiations between UK companies and Saudi Arabia which the KSA would not expect to be disclosed. The public authority has explained that disclosure of the requested information would lead to an unfavourable reaction on the part of the KSA, an important partner of the UK.

22. In the *Gilby* case the Tribunal considered the nature of the prejudice under section 27. It found that:

*"...prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the KSA or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty."*<sup>2</sup>

23. Having reviewed the withheld information the Commissioner is satisfied that disclosure would be likely to raise the concerns discussed by the Tribunal above and that therefore the exemptions in sections 27(1)(a), 27(1)(c) and 27(1)(d) are engaged. The Commissioner must be careful when describing why the exemption is engaged not to reveal information which would itself cause the prejudice which the exemption is designed to protect. The Commissioner discusses in more detail the

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<sup>2</sup> *Gilby*, open decision, para. 23.

reasons why disclosure would, or would be likely to, prejudice relations with the KSA in a closed annex to this decision notice, available to the public authority only.

24. The complainant has argued that information which has been redacted from the files has in fact been publicly available in other open files held by the public authority. In particular the complainant pointed to a brief for a meeting of the then Prime Minister Edward Heath with Prince (later King) Fahd in 1971 which she says has been available since 2005.

*"...although he [Prince Fahd] spends too much time away from Saudi Arabia on holiday and private pursuits".*

*"..after the useless Prince Khalid, the Crown Prince and First Deputy Prime Minister; but he could well emerge as the next king of Saudi Arabia, or at least the real power in the country in the event of Prince Khalid acceding to the throne".*

25. The complainant argues that there is no evidence that the disclosure of this information has prejudiced relations between the UK and Saudi Arabia. She also suggests that the fact that some redacted information is publicly available in open files held by the public authority indicates that material is being withheld at an inappropriate level. The Commissioner does not accept this argument. Whilst it appears that a very small amount of information withheld by the public authority has been inadvertently released, he does not think that this in itself proves that information has been inappropriately withheld. Furthermore, just because some information has previously been made available and has not resulted in any identifiable prejudice, it does not necessarily follow that disclosure of the withheld information would not lead to an unfavourable reaction on the part of the KSA in this case. In reaching this view the Commissioner is mindful of the findings of the Tribunal in *Gilby* where it stated that:

*"...the effect of formal disclosure of a mass of documents under the FOIA...would have been of a different order from the information that appears to have been either leaked or mistakenly put in the public domain, largely comprising individual and disaggregated documentation."*

26. For reasons he makes clear in the closed annex the Commissioner has decided that sections 27(1)(a), 27(1)(c) and 27(1)(d) are engaged on a 'would prejudice' basis.

Section 27(2)

27. The public authority has indicated that some of the withheld information is covered by the section 27(2) exemption.
28. Section 27(2) provides that information is exempt if it is confidential information obtained from a state other than the United Kingdom or from an international organisation or international court. Section 27(3) makes it clear that such information is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.
29. Whilst the public authority provided the Commissioner with copies of the withheld information it has not specifically said where the section 27(2) exemption is believed to apply. However, the Commissioner has reviewed the withheld information and has found that some of the information was obtained in circumstances in which it was reasonable for the KSA to expect that it would remain confidential. This includes information which relates to meetings or conversations with the King, other members of the Saudi Royal Family or the Council of Ministers. Information will be confidential under section 27(2) if the information was obtained in circumstances in which it was obtained make it reasonable for the state concerned to expect that the information will be treated confidentially. This is a different test from the common law of confidence and depends upon the culture and traditions of the country in question and the lack of an internationally uniform concept of confidence. In this case the Commissioner has taken into account the secretive nature of Saudi society, their sensitivities regarding arms sales and the fact that concepts such as freedom of information and transparency are given less weight there than in the UK or in other western countries. Having taken these considerations into account the Commissioner is satisfied that for information of this nature, section 27(2) will apply.
30. Therefore in this case the Commissioner found that some of the information is additionally exempt under section 27(2) of the Act.
31. For one particular type of information there is a separate reason as to why that information is confidential within the meaning of section 27(2). This relates to confidential information provided by a state other than the KSA. The Commissioner accepts that section 27(2) applies to this information and has elaborated further on the nature of this information in the closed annex.



### **Public interest test**

32. Section 27 is a qualified exemption and therefore is subject to a public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that where a qualified exemption applies, information shall only be withheld if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.
33. With the exception of the information referred to at paragraph 31, the Commissioner finds that there is significant overlap between section 27(1) and section 27(2) and therefore the Commissioner's decision with regard to the public interest test is the same in respect of both classes of information.

### **Public interest arguments in favour of disclosing the requested information**

34. The public authority has acknowledged that there is a public interest in disclosure in terms of promoting open government and public accountability – particularly where it concerns details of government policy and practice with regard to arms sales. The public authority said that it had also taken into account the presumption of openness in the Act, the fact that making available a full historical account enables informed debate and the fact that the information was over thirty years old.
35. The complainant has referred to the *Gilby* Tribunal decision for details of the public interest in disclosure of information concerning arms sales with Saudi Arabia. In that case the Tribunal found that there was a public interest in disclosure of information which revealed the extent of the possible involvement of UK officials in the payment of commissions in connection with arms sales, especially following the King's edict dated 20 October 1969 which made such payments unlawful in the KSA. The complainant suggests that a similar public interest exists in this case.

### **Public interest arguments in favour of maintaining the exemption**

36. The public authority has argued that disclosure would not be in the public interest as it would adversely affect bilateral and commercial relations with Saudi Arabia. It explained that Saudi Arabia trades extensively with the UK and has a large British expatriate community and it would not be in the interests of British trade or the interests of British nationals to release this information. It also submitted that maintaining good relations with Saudi Arabia was particularly important

given the “present climate in the Middle East” as it has important strategic value for the UK.

37. When asked to comment on the importance of the UK’s relationship with Saudi Arabia the Ministry of Defence informed the Commissioner that it is an important overseas market for the UK, especially in relation to arms sales, and that it is not in the national economic interest to release material which would harm this relationship. It also submitted that the relationship with Saudi Arabia was an important one as that country is an important ally and source of intelligence in the fight against terrorism.
38. The Commissioner accepts that there is a strong public interest in protecting international relations with Saudi Arabia. The Commissioner has considered the reasons put forward by the Ministry of Defence as well as the views of the Ambassador to Saudi Arabia, Mr Patey, which are referred to in the *Gilby* decision. Having done so, he is satisfied that the UK’s international relationship with Saudi Arabia is very important to our national interest. The Commissioner would also note that in the *Gilby* case the Tribunal had no hesitation in accepting the importance of maintaining good international relations with Saudi Arabia.
39. As regards the information referred to in paragraph 31 the public authority has said that disclosure of this particular information would damage relations with both the State which provided the information and Saudi Arabia. In its response to the complainant it explained that it is in the interests of the UK that it is trusted by its international partners to share information on a regular and confidential basis. It said that “to erode this foundation of trust would mean that the flow of information to the UK, vital to protect our national interests, may be compromised”.

### **Balance of the public interest arguments**

40. The Commissioner accepts that there is a general public interest in transparency and accountability surrounding the issue of arms with Saudi Arabia. However, in the view of the Commissioner, this is not sufficient to weigh the public interest in favour of disclosure. The Commissioner is satisfied that the UK’s relationship with Saudi Arabia is important to the UK’s national interest and therefore this argument weighs heavily in favour of maintaining the exemption.
41. Whilst the Commissioner has decided that in general the public interest in maintaining the exemption outweighs the public interest in disclosure, the Commissioner accepts the complainant’s argument that

there is a greater public interest as regards the possible involvement of UK officials in the payment of commission in relation to arms sales, as referred to in *Gilby*. Where information of this nature is found the public interest in disclosure will outweigh the public interest in maintaining this exemption and should be disclosed. Again it is useful to refer directly to the findings of the Tribunal.

*"...it is in our view a matter of potentially significant public interest to see to what extent HMG, through its servants and agents, was involved directly or indirectly in seeking to secure contracts in reliance on the payment of commissions or agency fees."*<sup>3</sup>

42. As regards the possible involvement of Saudi officials the Commissioner has decided that the public interest is balanced differently. Clearly the extent and severity of the prejudice caused to UK–Saudi relations by disclosure of such information would be greater than if the disclosure of information were confined to the involvement of UK officials.
43. In the closed annex the Commissioner discusses how this information relating to the activities of UK officials may best be disclosed without inappropriately revealing any wider information regarding the negotiations which are the subject of the two files, in particular the activities of Saudi officials.
44. The Commissioner has found that for most of the withheld information the public interest in maintaining the section 27(1) and section 27(2) exemptions outweighs the public interest in disclosure. However, for information relating to the role of UK officials in the possible payment of commissions and bribes with regard to arms sales which are the subject of the two files the Commissioner finds that the public interest in maintaining the exemptions does not outweigh the public interest in disclosure. The Commissioner has provided the public authority with a confidential schedule setting out what information he considers should be disclosed.
45. As regards the information referred to in paragraph 31, the Commissioner has found that the public interest in maintaining the exemption outweighs the public interest in disclosure and again further reference to this is made in the closed annex.

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<sup>3</sup> *Gilby*, open decision, para. 56.

## Procedural Requirements

46. The Commissioner has found that additional information should have been disclosed to the complainant. Therefore, because the public authority failed to make this information available at the time of the request the Commissioner must record the following procedural breaches of the Act.
47. Firstly, by failing to make the information available to the complainant the public authority breached section 1(1)(b) of the Act. By failing to make the information available to the complainant within 30 working days the public authority breached section 10(1) of the Act (the Time for Compliance Regulations amend section 10(1) of the Act to allow an appropriate records authority thirty days to comply with a request for a transferred public record which has not been opened).

## The Decision

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48. 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 dealt with the request in accordance with the Act to the extent that it correctly withheld some of the requested information under sections 27(1)(a), 27(1)(c), 27(1)(d) and 27(2) of the Act.
49. 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 breached section 1(1)(b) of the Act by failing to disclose some of the requested information to the complainant.
  - The public authority breached section 10(1) of the Act by failing to disclose some of the requested information to the complainant within 30 working days of receiving the request.

## Steps Required

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50. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- The public authority shall disclose to the complainant the information listed in the confidential schedule.
51. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

### **Failure to comply**

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52. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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53. 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: 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 sent.

**Dated the 3<sup>rd</sup> day of March 2011**

**Signed .....**

**Graham Smith  
Deputy Commissioner  
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."

### Effect of Exemptions

#### **Section 2(2) provides that –**

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (c) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (d) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

### 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."

## **International Relations**

### **Section 27(1) provides that –**

“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) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

### **Section 27(2) provides that –**

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

### **Section 27(3) provides that –**

“For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.”