

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 March 2011

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

Summary

The complainant asked the Foreign and Commonwealth Office (FCO) to provide records held by it confirming the existence, or lack, of exports of any items under the current UK Military List to the state of Israel by a named company.

FCO first said that information was held and then that it was not. The Commissioner found, as a matter of fact, that information falling within the scope of the request was held.

The Commissioner's decision is that the public authority did not deal with the request for information in accordance with sections 1(1)(a) and 10(1) of the Act.

The non-disclosure of the information held is being addressed in another complaint, so the Commissioner requires no steps to be taken in response to this notice.

The Commissioner's Role

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

2. In the matter of export licences for items of military equipment the Foreign and Commonwealth Office (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.

3. The existence of a licence does not confirm the existence of exports or a lack of them. This is because the granting of a licence does not necessarily result in exports as circumstances may change over time and prospective sales may sometimes not be made.

The Request

4. On 19 October 2009 the complainant asked FCO to provide: *"all records held by the FCO that confirm the existence of, or lack thereof, of exports of any items under the current UK Military List (directly or indirectly) to the state of Israel by the following company for the period 1998 to present day"*. He added the name and address of a company (the company)".
5. On 16 November 2009 FCO said that some relevant information was held and that FCO was considering where the balance of the public interest lay in respect of the application of the exemptions in section 27 (International relations) and section 43 (Commercial interests) of the Act. FCO promised to provide a definitive response by 7 December 2009.
6. On 7 December 2009 FCO told the complainant that it did **not** hold any information on actual exports. FCO added, by way of clarification, that the information referred to in its correspondence dated 30 November [16 November may have been intended] had since been determined as being outside the scope of his request. FCO drew attention to the respective roles of itself and BIS in export licensing matters and explained where information about export licences was to be found.
7. On 12 December 2009 the complainant told FCO that it had not provided him with any reason for its determination and appeared to have changed its mind about its original finding that some relevant information was held. He said, for clarity, that he sought any recorded relevant information and wished its meaning to be taken in the widest possible sense. He said that he was not only seeking confirmation about direct 'actual exports' but any records held by FCO or records of information provided to FCO that were relevant to or indicative of the fact that products of the company had found their way into Israeli military supplies, directly or indirectly. He said it was clear to him that FCO had found something relevant when it first looked for the information but had since determined that the relevant record fell

outside the scope of his request for no good reason. He asked for an internal review.

8. On 15 January 2010 FCO told the complainant that it had been correct in telling him that it did not hold relevant information. FCO said it did not hold information on actual exports and apologised for having given him incorrect information previously.

The Investigation

Scope of the case

9. The Commissioner only considered whether or not FCO held information within the scope of the request.
10. On 17 March 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

12. On 21 June 2010 the Commissioner opened his investigation into the complaint.
13. On 22 June 2010 FCO told the Commissioner that it processed applications for export licences and as such may hold applications for export licences made by the company. However the existence of an export licence did not, FCO said, confirm the existence, or lack thereof, of exports. Therefore FCO said it did not hold any relevant information; FCO said that it did not hold any information on actual exports.
14. On 25 June 2010 the Commissioner informed the complainant that FCO had formally confirmed to the Commissioner that it did not hold any information within the scope of his request. The Commissioner invited the complainant to make a further request to FCO about any information held regarding the issue of export licences to the company and said that 'information not held' was FCO's final position.
15. Later on that same day, 25 June 2010, the complainant said that the Commissioner had failed to properly investigate the complaint. He then provided new evidence to the Commissioner showing that FCO was responsible for monitoring the use of export licences and was likely therefore to hold records other than simply the export licences themselves.

16. On 5 July 2010 the Commissioner put the complainant's new additional evidence to FCO and invited its comments.
17. Also on 5 July 2010 the complainant provided further supporting evidence to the Commissioner. He said that in the then recent case of R v Saibene in Hove Crown Court a jury had acquitted seven people of conspiracy to cause criminal damage at the company's factory. He said that the defendants had been acquitted as the jury had found it reasonable for the defendants to have believed that the company were involved in the supply of military components to Israel, despite this being in contravention of stated UK arms control policy. He added that it was quite reasonable, in the context of that case, to believe that further documents existed in FCO within the scope of his request. The Commissioner also put this further supporting evidence to FCO for comment.
18. On 21 July 2010 FCO told the Commissioner that the information it held (about which it had changed its mind as to relevance to the request) was about an export licence that had been issued but later returned unused to BIS. FCO added that FCO and BIS had discussed the information request but had agreed that the correct course of action was to withhold the information. FCO said that BIS and FCO had two distinct roles. FCO did not keep records of returned licences and was not responsible for monitoring the use of export licences which would normally be for, and at the discretion of, BIS. FCO said that the complaint appeared to have come about purely as a result of a misunderstanding on the respective roles of BIS and FCO and apologised if FCO was the cause of this misunderstanding; there had been no intention to mislead.
19. On 5 August 2010 the Commissioner relayed FCO's explanation in detail to the complainant along with its conclusion that information was not held. On 6 August the complainant asked the Commissioner to proceed to a formal decision so that he could appeal.
20. Also on 6 August 2010 the complainant provided the Commissioner with a further explanation of his reasons for his continuing dissatisfaction. He said his position was that any information held by the FCO (regarding the now apparently returned export licence) was clearly relevant to his original request, and should have been disclosed. He said that FCO had given evidence at a Hearing that it gathered intelligence about the traffic of military components from the UK to other countries. He added that the information held by FCO about licences may have referred to Israel for it to have been turned up in the first place. He said that he had now made a fresh and closely related information request to FCO based on what it had said, but he

still believed the Commissioner should have upheld his complaint. If FCO complied with his new request then, he said, there would clearly be no need for him to appeal the Commissioner's decision in this matter.

21. Also on 6 August 2010 the Commissioner put the complainant's further supplementary evidence to FCO for comment.
22. On 10 September 2010 FCO replied to the complainant's second and closely related information request of 6 August 2010, where, for the benefit of the FCO, the disputed export licence information was clearly in the scope. FCO said that it did not hold material within the scope of the original request, but it did hold material which fell within the scope of the 6 August request. The difference was, FCO said, because the requests sought different sets of information. FCO added that in its view the information (for the latter request) was exempt under section 41 of the Act. FCO added, to clarify and avoid any misunderstanding, that it did not hold any records of actual exports but provided advice on licences prior to issue or refusal to BIS. FCO said that the existence of an export licence did in no way prove the existence or lack thereof of an actual export.
23. On 14 September 2010 FCO told the Commissioner that it did not agree that the returned export licence was relevant to the original request which had been for: "records held by FCO that confirmed the existence of, or lack thereof, of exports". FCO said that the returned export licence only confirmed that one particular export did not take place; it did not show a "lack of exports".
24. Also on 14 September the Commissioner told FCO that he was minded not to accept FCO's argument that the return of a licence indicating the lack of one particular export did not fall within the scope of the part of the request that was for records confirming the lack of exports.
25. On 15 September 2010 the Commissioner invited the complainant to consider concluding the 19 October 2009 matter informally as his later request of 6 August 2010 had resulted in confirmation that relevant information was held. FCO had applied the section 41 exemption (information provided in confidence) which gave him a further route of challenge and, if needed, complaint to the Commissioner. However on 16 September 2010 the complainant replied and continued to press for the Commissioner to proceed to a formal decision in this matter which he has done.

Finding of fact

26. The Commissioner found, as a matter of fact, that FCO's record about the return of an unused export licence was a record that confirmed the existence or lack of a relevant export.

Analysis

Substantive Procedural Matters

27. The Commissioner has found that FCO held information that came within the scope of the complainant's request of 19 October 2009. However, in its initial response of 16 November 2009 FCO said that information falling within the scope of the request was held. However on review, it contradicted that position and then said that relevant information was not held. As the Commissioner has found that information falling within the scope of the request was held it follows that FCO was in breach of sections 1(1)(a) and 10(1) of the Act in denying at internal review that information specified in the request was held.
28. In its letter of 10 September 2010, responding to the near identical information request of 6 August 2010, FCO acknowledged that relevant information was held and applied the section 41 exemption to it. Having found that information is held, the Commissioner would normally have required FCO to consider disclosing it. However as the FCO have now considered this in response to the 6 August 2010 request, and their refusal is currently the subject of a further complaint to the Commissioner, there would be no point now in the Commissioner requiring FCO to take that step.

The Decision

29. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with section 1(1)(a) of the Act.

Steps Required

30. As the non-disclosure of the information held is being addressed in another complaint, the Commissioner requires no steps to be taken.

Right of Appeal

31. 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.

Website: 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 14th day of March 2011

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."