

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 August 2016

**Public Authority:** Ministry of Defence  
**Address:** Whitehall  
London  
SW1A 2HB

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the Ministry of Defence (MOD) for correspondence and records it held about certain ministerial meetings with contractors which took place in early 2015. The MOD provided the complainant with some of the information it held but withheld further information on the basis of the exemptions contained at sections 36(2)(b)(i) and (ii), 36(2)(c) (effective conduct of public affairs), 43(2) (commercial interests), 26(1)(b) (defence) and 40(2) (personal data). The Commissioner is satisfied that the withheld information is exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) and that in all the circumstances of the case the public interest favours maintaining these exemptions.

#### Request and response

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2. The complainant submitted the following request to the MOD on 20 November 2015:

*'Under the Freedom of Information Act 2000, please can you provide me with:*

*All correspondence concerning and records (if minutes were taken) of the following ministerial 2015 meetings*

*21 January 2015 - Selex  
January - Finmeccanica  
February - Rugby Federation Union  
February - Wilson James Ltd*

*March - Jacobs*  
*March - Aircraft Carrier Alliance*  
*March - Fujitsu'*

3. The MOD contacted him on 21 December 2015 and explained that it needed further time to consider the balance of the public interest test.
4. The MOD provided the complainant with a substantive response on 22 January 2016. The MOD explained that no information was held regarding the meetings with Selex and Wilson James Ltd; disclosed the information held concerning Fujitsu and the Rugby Federation Union (albeit with redactions made on the basis of section 40(2) of FOIA); and explained that the remaining information concerning meetings with Finmeccanica, Jacobs and Aircraft Carrier Alliance was being withheld on the basis of section 36 of FOIA.
5. The complainant asked the MOD to conduct an internal review of this decision including both in respect of its reliance on the exemptions cited and the absence of any information being held in respect of some of the meetings.
6. The MOD informed him of the outcome of the review on 10 March 2016. The review confirmed that the withheld information was exempt from disclosure on the basis of sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA. The review also explained that certain parts of the information were also exempt from disclosure on the basis of sections 43(2), 26(1)(b) and 40(2) of FOIA. Finally, the review explained that the MOD was satisfied that all relevant information falling within the scope of the request had been located.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 21 March 2016 to complain about the MOD's decision to withhold the remaining information falling within the scope of his request on the basis of the exemptions cited in the internal review. This information consists of records of meetings between MOD ministers and Finmeccanica, Jacobs and the Aircraft Carrier Alliance. The complainant did not ask the Commissioner to consider whether the MOD held any further information falling within the scope of his request.

## Reasons for decision

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### Section 36 – effective conduct of public affairs

8. Sections 36(2)(b)(i) and (ii) and section 36(2)(c) state that:

*'(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act...*

*(b) would, or would be likely to, inhibit-*

*(i) the free and frank provision of advice, or*

*(ii) the free and frank exchange of views for the purposes of deliberation*

*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'*

9. In this case the Secretary of State for Defence provided the opinion in relation to the application of sections 36(2)(b) and (c). The Commissioner is satisfied that the Secretary of State is a qualified person for the purposes of section 36.

10. In determining whether these exemptions are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
- The qualified person's knowledge of, or involvement in, the issue.

11. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held

on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

12. The qualified person argued that in relation to sections 36(2)(b)(i) and (ii) disclosure of the withheld information would – as opposed to simply being likely to – impact on the MOD's ability to engage in free and open discussions with its commercial partners as its disclosure would have a chilling effect on similar discussions in the future.
13. The Commissioner accepts that the qualified person's opinion is a reasonable one. The withheld information contains detailed records of meetings that took place between the MOD and three of its contractors. The records clearly reflect that the discussions included free and frank discussions and the Commissioner accepts that it is reasonable to argue that disclosure of the information could potentially lead to an inhibition on the contributions, both by the MOD and contractors, made to similar meetings in the future. The Commissioner is therefore satisfied that the withheld information is exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii).

### **Public interest test**

14. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining either of the exemptions cited outweighs the public interest in disclosing the information.

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

15. The complainant noted that the defence industry has been publicly criticised for being too cosy with contractors, and there should be transparency over the reasons prominent contractors are provided with ministerial time. Disclosure of the information would therefore engender more trust of politicians. Furthermore, disclosure could in turn encourage better policy formulation, as the public would have a clearer idea why these meetings were necessary; without providing this information they appear clandestine. Alternatively, the complainant argued that the correspondence about these meetings could expose government wrongdoing and inform public debate. Furthermore, the complainant suggested that similar records had been provided on a number of occasions by government departments.

16. For its part, the MOD acknowledged that release would demonstrate openness and transparency about the MOD's business relationships with its major commercial partners. Given the level of public money involved, the impact on the UK economy of jobs sustained by the work, and the importance of the projects involved for achieving the government's defence objectives, release would provide public assurance about the effectiveness of steps taken by MOD to ensure strong contractor performance and the maintenance of value for money in defence procurement for the taxpayer on key defence projects.

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

17. However, the MOD argued that it was firmly of the view that the public interest favoured maintaining sections 36(2)(b)(i) and (ii). It emphasised that disclosure would inhibit the free and frank exchange of views for the purposes of deliberation in the future. The MOD argued that this would inhibit the free flow of information between the MOD and its commercial partners and contractors at its most senior level. This would impair the MOD's ability to monitor the contractors' performance and identify potential critical performance issues that need to be addressed at an early stage.
18. The MOD explained that the information in question contained discussions of the ongoing issues that the companies were facing and similarly the issues MOD senior officials were facing in relation to challenges facing UK defence. The MOD was firmly of the view that disclosure of the information would have a chilling effect on the candour of such discussions in the future because it could reduce the willingness of the participants to engage fully and frankly in discussions because of the fear of public exposure on potentially contentious issues that might be sensationalised by the media. The MOD suggested that a breakdown in trust could impair the MOD's ability to procure and manage defence contracts effectively which would have a negative effect on future UK defence strategy.
19. The MOD argued that disclosure could also mean that the fear of disclosure would result in future discussions being held 'off-record'. The MOD explained that this would limit their utility if, at a later date, officials were unable to draw on records about previous trusted discussions to support on-going decisions of follow-up issues related to its commercial relationship with a contractor.

### **Balance of the public interest test**

20. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This

means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.

21. Having reviewed the withheld information it is clear to the Commissioner that it represents examples of detailed records, retained for the MOD's purposes, of candid discussions with some of the MOD's key contractors. Consequently, in the Commissioner's opinion disclosure of this information would provide a direct and clear insight into the MOD's relationship with the three contractors in question at the point the meetings took place in early 2015. Furthermore, disclosure would directly address the public interest arguments identified by the complainant, and indeed those in favour of disclosure advanced by the MOD. There is, therefore, a strong public interest in the disclosure of this information in order to meet such public interests, interests which cannot and should not be dismissed lightly.
22. However, the Commissioner has ultimately concluded that these are outweighed by the public interest in maintaining the exemptions. In reaching this conclusion the Commissioner recognises that whilst disclosure would provide an insight into these three meetings, release of the information risks having a negative impact on the MOD's relations with its contractors more widely. Furthermore, and key to his findings, is the Commissioner's view that the MOD has in no way exaggerated the potential consequences of this information being disclosed. Rather, the Commissioner is satisfied that disclosure would have a severely inhibiting effect on the candour of similar discussions in the future, both in respect of the topics discussed and the tone of such discussions. Given the seniority at which such meetings take place – and as a result the importance of the issues being discussed – the Commissioner is satisfied that if such meetings became less effective then the extent of the detrimental consequences to the MOD's ability to effectively manage its relations with key contractors would be widespread.
23. In reaching this finding the Commissioner wishes to emphasise that he is not seeking to underestimate the public interest in disclosure of this information. Rather, taking all of the above into account he is satisfied that the public interest is better served by withholding the information on the basis of sections 36(2)(b)(i) and (ii).
24. In light of this decision, the Commissioner has not gone on to consider whether the withheld information is also exempt from disclosure on the basis of the other exemptions cited by the MOD.

## Right of appeal

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25. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

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

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

26. 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.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**