

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 July 2022

Public Authority: Department for International Trade
Address: Old Admiralty Building
London SW1A 2DY

Decision (including any steps ordered)

1. The complainant has requested information about the methodology used for evaluating alleged breaches of international humanitarian law. This was with respect to incidents allegedly caused by fixed wing aircraft that had been sold to or transferred to Saudi Arabia. The Department for International Trade ("DIT") provided some information but refused to provide other information it held within the scope of the requests citing sections 24 (national security), 26 (defence), 27 (international relations) and 40 (personal data) as its basis for doing so. It also refused to confirm or deny whether it held other information and cited section 23 (security bodies) as its basis for doing so. It withdrew reliance on section 40 at internal review but otherwise upheld this position.
2. The Commissioner's decision is that DIT is entitled to rely on the exemption at section 27 as its basis for withholding the requested information.
3. No steps are required.

Request and response

4. On 9 July 2020, the complainant wrote to DIT and requested information in the following terms:

"I write in regard to the written statement by Secretary of State for International Trade Elizabeth Truss on 7 July 2020 about export licences for the sale or transfer of arms and military equipment to Saudi Arabia.

The secretary of state said the government has developed 'a revised methodology in respect of all allegations which it is assessed are likely to have occurred and to have been caused by fixed wing aircraft' and that 'each of those allegations has been subject to detailed analysis' and 'an evaluation has then been made, in respect of each incident, whether it is possible that it constitutes a breach of IHL [International Humanitarian Law] or whether it is unlikely that it represents a breach.'

Following on from her statement, I would like to know the following:

1. What is the revised methodology used to assess allegations?
 2. How many separate incidents were reviewed during the evaluation process?
 3. How many incidents were assessed as possible violations of IHL?
 4. How many incidents were assessed as unlikely to be breaches of IHL?
 5. For many incidents was there "insufficient information" to make an evaluation?"
5. On 28 November 2020, DIT responded.
6. In respect of request 1, it drew the complainant's attention to a Written Ministerial Statement of 7 July 2020. It said that this statement "explained and set out details of the revised methodology developed to comply with the Court of Appeal's judgment of 20 June 2019 and applied to re-take the decisions remitted by the Court of Appeal on the correct legal basis. The WMS sets out the additional procedures that have been put in place".
7. In respect of requests 2, 3, 4 and 5 it responded as follows. It said that the Ministry of Defence ("MoD") held a tracker of alleged incidents of violation of IHL and that it did not hold one. It explained that its own analysis was applied to 310 incidents and that 528 incidents were entered onto the MoD tracker. It is not clear whether these are separate incidents. 19 of these were duplicates and 166 were not deemed credible. It said that there were a further 33 allegations awaiting assessment. Turning to the 310 incidents that it has a record of, it said

that “a small number” have been treated as IHL violations. It argued that releasing more specific information would have a number of detrimental consequences. It listed these detrimental consequences as follows: - negative impact on bilateral relations with Saudi Arabia with specific reference to the provision, in the future, of confidential information; - negative impact on relations with other States because disclosure may incorporate intelligence through cooperation with them; and - negative impact on national security because disclosure could enable conclusion to be drawn regarding the scope of UK sovereign assets and co-operation with other States.

8. It listed the following exemptions as being applicable to the information and explained why it believed each was applicable: - section 24 (safeguarding national security) - section 26 (defence) - section 27 (international relations) - section 40 (contravene data protection law) - section 41 (information provided in confidence). It also refused to confirm or deny whether it held any information within the scope of the requests that related to the Security Bodies. It cited section 23(5) (security bodies).
9. The complainant requested an internal review on 2 November 2020. He asked it specifically to review its response to his requests 3, 4 and 5. He explained that he was not looking for details of individual assessments but was, instead looking for the final tallies of the outcome of those assessments as described in his requests 3, 4 and 5. He accepted that there would be a public interest in shielding the details of those assessments (he referred to sections 24 and 26 in this regard) but that there was a stronger public interest in knowing the numbers. He argued that section 27 did not apply. He argued that it had no bearing on trade between the UK and Saudi Arabia. He also said that the UK government had acknowledged in response to his FOIA request and in parliament that a number of incidents had been treated as violations or non-violations of IHL. He did not accept that providing the number of such incidents would have a significant further adverse impact on bilateral relations such that it would outweigh public interest in providing the numbers. He also disputed whether sections 40 or 41 could apply as the numbers sought did not constitute personal data nor would they constitute a breach of confidence because there was no indication of what conclusions could be drawn about any specific incidents.
10. DIT sent him the outcome of its internal review on 18 December 2020. It withdrew reliance on section 40 but maintained reliance on the other exemptions it cited. It argued that there was potential for the “mosaic” effect where this information was combined with other available information which would have a prejudicial outcome. It then set out a detailed explanation as to why it was relying on each of the exemptions in question.

11. With respect to section 24, while acknowledging the public interest in transparency to improve debate on the issue, it reiterated its arguments about the "mosaic effect" and that a motivated individual would be able to determine information which could be put to use in a manner detrimental to national security.
12. With respect to section 26 it made a similar argument about the mosaic effect and the prejudicial impact it would have on the UK's defences.
13. With respect to section 27, it disagreed with the complainant's view about the likelihood of damage to international relations and explained why in some detail.
14. With respect to section 41, it acknowledged that it had not explained clearly how, in its view, this exemption applied. It asserted that the UK government could be sued for breach of confidence and that this would make the disclosure to the UK of confidential information less likely. It referred to "the intangible value of loss of confidence from states with whom the UK has critical bilateral relations which extend beyond trade to areas of defence and national security".
15. It turned finally to its use of section 23 in order to refuse to confirm or deny whether it held information about security bodies within the scope of the complainant's request. It explained that it was limited in what it could set out in the letter about this although it had reviewed the points the complainant had raised.

Scope of the case

16. The complainant contacted the Commissioner on 21 December 2020 to complain about the way their request for information had been handled. It was clear to the Commissioner that investigation of the case would require one of his officers with an appropriately high level of security clearance to view any withheld information in situ. Unfortunately, due to the impact of access limitations as a consequence of the Covid-19 pandemic, the Commissioner was unable to arrange this with DIT in a timely manner.
17. During the course of the Commissioner's investigation, DIT explained that it now sought only to rely on sections 27(1)(a), (c) and (d), section 24(1) and section 26(1)(b). It confirmed that it no longer sought to rely on any other exemptions that it had cited in correspondence with the complainant.
18. The Commissioner has considered whether DIT is entitled to withhold the information that it holds within the scope of requests 3, 4 and 5 on

the basis of sections 27(1)(a), (c) and (d), section 24(1) and section 26(1)(b).

Reasons for decision

Background

19. DIT explained to the Commissioner that the subject matter of the request is “part of ongoing judicial review proceedings in which the NGO Campaign Against Arms Trade (CAAT) is challenging the decisions retaken by the Secretary of State for International Trade (the Secretary of State) in July 2020:

a. not to suspend the licences for the sales of arms and military equipment to the Kingdom of Saudi Arabia (Saudi Arabia or KSA) for possible use in the conflict in Yemen; and

b. to continue to grant further licences for the sale or transfer of arms and military equipment to KSA for possible use in the conflict in Yemen.

These decisions were retaken pursuant to the Order of the Court of Appeal dated 20 June 2019 made in respect of earlier proceedings brought by CAAT against the Secretary of State in which CAAT challenged the equivalent decisions taken by the then Secretary of State in December 2015.¹ In that decision the Court of Appeal endorsed the Secretary of State’s decision-making processes but held that ‘[t]he question whether there was an historic pattern of breaches of IHL on the part of the Coalition, and Saudi Arabia in particular, was a question which required to be faced... At least the attempt had to be made’.

The Secretary of State carefully considered the scope and effect of the Court of Appeal’s judgment and developed a revised methodology as part of the decision-making process under the UK’s strategic export licensing criteria² in accordance with the legal approach identified by the Court. The figures which are the contested part of this FOIA request are derived from the use of this revised methodology.

¹ (Campaign against Arms Trade) v Secretary of State for International Trade [2017] HRLR 8 (DC) and [2019] EWCA Civ 1020 [2019] 1 W.L.R. 576 (CA)

² At the time the Consolidated EU and National Arms Export Licensing Criteria, now the Strategic Export Licensing Criteria.

Permission to bring the judicial review claim was granted on 20 April 2021. On the same date, the Court made a declaration under section 6 of the Justice and Security Act 2013 that these are proceedings in which a closed material application may be made to the court. Special Advocates have been appointed and, on 25 June 2021, the Secretary of State made an application to withhold CLOSED material from the Claimant and the Claimant's legal representatives. In accordance with the procedure under section 8 of the Justice and Security Act 2013, the Secretary of State and the Special Advocates have reached agreement in relation to disclosure of the CLOSED material. This agreement includes further gisting of the information which is the subject matter of this request. It is anticipated that the Secretary of State will serve further OPEN material arising from the section 8 process on the Claimant shortly. If and when that disclosure has been completed, the Secretary of State will provide the relevant gist to the ICO and the requester".

20. DIT set out additional background information:

"The Export Control Joint Unit (ECJU) administers the UK system of strategic export controls and brings together officials from the Department, the Foreign, Commonwealth and Development Office (FCDO) and the MoD [Ministry of Defence].

MoD maintains a tracker ('the Tracker') which collects information, reports and evidence of alleged violations of IHL which may have been caused by fixed wing aircraft from HMG [Her Majesty's Government] sources and open sources, including but not limited to the UN Panel of Experts on Yemen and NGOs. This information is analysed and MoD takes a view on whether an allegation is credible (i.e. did an event occur), and, if so, takes a view on whether the incident appears to be a 'possible' violation of IHL or appears to be unlikely to be a violation of IHL ("the IHL Analysis"). This view is shared with the FCDO.

The FCDO, through its officials in ECJU and the Foreign Secretary, provides advice to the Secretary of State for International Trade on the application of the Strategic Export Licensing Criteria (most recently set out in the WMS dated 8th December 2021), in relation to applications for licences to export air combat platforms, munitions and associated components to Saudi Arabia for possible use in the conflict in Yemen.

To provide this advice, the FCDO Middle Eastern and North Africa Department (MENAD) draws together information and analysis in relation to, among other things: (i) KSA's past and present record of compliance with IHL; (ii) its attitude towards the principles of IHL; and (iii) its capacity to comply with those principles. MENAD has, since October 2015, produced regular updates which bring together all relevant information from the Government's various sources regarding

the political and military situation in Yemen, and, in particular the Saudi-led Coalition's compliance with IHL (including the MoD's analysis of allegations of IHL violations) (IHL Updates).

The purpose of the IHL Updates is to provide ECJU-FCDO with the necessary factual information to analyse KSA's compliance with IHL for the purposes of the Criterion 2C test of the Strategic Export Licensing Criteria 5 as well as to ensure that the Foreign Secretary is aware of the developing factual position in relation to the IHL situation in Yemen. The IHL Updates are the main vehicles by which information is fed into ECJU-FCDO. On receipt of each IHL Update, ECJU-FCDO completes an overarching assessment of KSA's record, attitude and capability in relation to compliance with the key principles of IHL. The overarching assessments and the IHL Updates are subsequently submitted to the Foreign Secretary with a recommendation as to the advice which she should give to the International Trade Secretary on the question of whether the threshold for refusing licences for air combat platforms, munitions and associated components under Criterion 2C has been met."

21. The relevant provisions of section 27(1) state:

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,...

(c) the interests of the United Kingdom abroad,

or

(d) the promotion or protection by the United Kingdom of its interests abroad.

22. In order for a prejudice based exemption, such as that set out in section 27(1), to be engaged the Commissioner considers that three criteria must be met:

- firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure 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;

- thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
23. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; there must be a real and significant risk. With regard to the higher threshold, this places a stronger evidential burden on the public authority.
 24. With the above in mind, the Commissioner has considered the withheld information and DIT's submissions in support of its reliance on provisions within section 27(1).
 25. In correspondence with the complainant, DIT told them:

"The effective conduct of international relations depends upon maintaining trust and confidence between governments. This relationship of trust allows for the free and frank exchange of information on the understanding that it will be treated in confidence. If the UK does not respect such confidences, then its ability to protect and promote UK interests through international relations will be hampered. The State concerned, or indeed other states, may be reluctant to share sensitive information with UK government in future and may be less likely to respect the confidentiality of information supplied by the UK government to them, this will inevitably be a detriment to UK interests."
 26. The Commissioner is satisfied that the prejudicial outcome described relates to the applicable interests described in the exemption.
 27. DIT provided the Commissioner with further arguments identifying the particular harm it considers may arise from disclosure of the withheld information in this case. The Commissioner will not set out these further arguments because they make specific reference to the withheld information.
 28. Having considered all the arguments put to him and having viewed the withheld information, the Commissioner is satisfied that there is a causal relationship between the potential disclosure of the withheld information and the interests which section 27(1)(a) is designed to protect.
 29. With respect to the likelihood of prejudice occurring, DIT appears to argue that prejudice would arise as a consequence of disclosure. In other words, it considered that the higher level of prejudice applied.
 30. Having duly considered the arguments put forward by DIT, and having viewed the withheld information, the Commissioner is satisfied that there would be a real and significant risk of prejudice if the withheld

information were to be disclosed. Acknowledging that prejudice to the relationship between the UK and the Kingdom of Saudi Arabia - in the way predicted by DIT - would occur, the Commissioner accepts that, in the circumstances of this case, the higher threshold of likelihood is met.

31. He therefore finds the exemption engaged in relation to the information withheld by virtue of section 27(1)(a) and has carried this higher level of likelihood through to the public interest test.

The public interest test

32. Section 27(1) is a qualified exemption and is subject to a public interest test. This means that, even where its provisions are engaged, it is necessary to decide whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

The complainant's arguments

33. The complainant argued that the exemption was not engaged but that, if it were engaged, the public interest would favour disclosure. They said: "I think it is clearly in the public interest to understand to what extent UK arms sales are being linked to breaches of international law. Furthermore, given that the government has already acknowledged such incidents have happened in relation to Saudi Arabia, I fail to see how providing a specific number would harm relations further to the extent that they would undermine UK national security".

The public authority's arguments

34. DIT acknowledged that there was a public interest in disclosure to add further understanding for the public about decisions that the UK government had taken. In correspondence with the Commissioner, it also acknowledged that "Saudi Arabia's military operations in Yemen in particular have generated significant public and parliamentary interest in the UK's relationship with Saudi Arabia, specifically with regard to the export of military goods".
35. However, in correspondence with the complainant, it identified the following three points as factors in favour of maintaining the exemption. It said:

"- Release of the information requested would not necessarily support further understanding of the decisions reached as the overall assessment under criterion 2C of the Consolidated Criteria is a complex and qualitative assessment which is not wholly determined by the IHL

Analysis component or on a quantitative evaluation of allegations of past incidents of breaches of IHL.

- Releasing the information would have a detrimental effect on the bilateral relationship with Saudi Arabia which is wider than trade relations and this may in turn impact on UK national security and our sovereign assets and military capabilities.
 - Release of the information would be likely to be used to the advantage of actors who are threats to UK interests”.
36. It expanded upon these points in correspondence with the Commissioner and in discussions with him. It explained that “Saudi Arabia is an important partner for the UK in a wide range of areas. It is a member of the G20 and a major regional power. In particular, the UK works closely with Saudi Arabia in pursuit of an effective political process to end the conflict in Yemen, including in our capacity as penholder on Yemen in the UN Security Council.” The Commissioner understands that a penholder is a member of the UN Security Council who initiates and chairs the informal drafting process in respect of decisions of the Security Council.
37. It explained why, in its view, there was a high risk of a negative outcome in respect of international relations. It drew attention to a comment of the Divisional Court in *CAAT -v- Secretary of State for International Trade [2017] EWHC 1726 (Admin)* which said that the process of analysis in respect of the figures in question “has the hallmarks of a rigorous and robust, multi layered process of analysis...”.
38. It also pointed out that it had published information on the subject including “the Written Ministerial Statement of 7 July 2020³ which sets out the details of the revised methodology developed to comply with the Court of Appeal’s judgment of 20 June 2019 to address public interests. We consider that the information that has already been released via the WMS of 07 July 2020 and in response to a Parliamentary Question on 11 September 2020 informed public debate as to the strategic licensing decisions made by HMG. The requested information would not further inform public debate relating to this issue.”
39. It asserted that the public interest has and continues to be served through the judicial review process. It explained that the revised methodology was implemented following the Court of Appeal’s ruling. It

³ <https://questions-statements.parliament.uk/written-statements/detail/2020-07-07/HCWS339>

drew attention to Court of Appeal deciding that the Secretary of State's conclusion that there had been no "pattern" of violations was not irrational. It said that this assessment had been made taking into account all the information that was available to the Secretary of State which may not be available to "NGOs, UN Panel of Experts or the wider public".

40. In summary, it asserted that disclosure "would cause harm to our international relations with Saudi Arabia. A key part of this is the close relationship between UK and Saudi Arabia on defence and security issues, including combating terrorism and promoting regional security. For these reasons, it is the Department's conclusion, that the balance of public interest lies in favour of withholding this information from the public domain".
41. It provided additional comments to the Commissioner's representative when they viewed the information in situ. The Commissioner is unable to set out the detail of those additional comments because to do so would involve disclosure of the withheld information.

Balance of public interest

42. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
43. Although FOIA does not list the factors that would favour disclosure, the Commissioner has suggested that among the factors that would weigh in favour of disclosure are:
 - furthering the understanding and participation in the public debate of issues of the day;
 - promoting accountability and transparency of public authorities for decisions taken by them; and
 - promoting accountability and transparency in the spending of public money.
44. He has also taken into account the presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest.
45. In the Commissioner's view, there are a number of powerful public interest arguments in favour of disclosure in this case. He accepts that

there is a public interest with respect to the way in which the UK government works with other states, such as the Kingdom of Saudi Arabia.

46. The Commissioner also recognises the strength of the public interest in matters concerning human rights in general and aspects of Saudi Arabia's justice system in particular.
47. However, in the circumstances of this case, the public interest against disclosure is that in avoiding prejudice to international relations, specifically UK/Kingdom of Saudi Arabia relations. The relevant considerations in reaching a judgement on the balance of the public interest therefore extend beyond the actual content of the withheld information itself.
48. In the Commissioner's view it is strongly in the public interest that the UK maintains good international relations. He considers that it would not be in the public interest if there were to be a negative impact on the effective conduct of international relations as a result of the release of the information at issue in this case.
49. From the evidence he has seen, the Commissioner is satisfied that disclosure of the withheld information represents a significant and real risk to the UK's relations with the Kingdom of Saudi Arabia. In his view, it is clear that disclosure in this case would not only damage the UK's relationship with the Kingdom of Saudi Arabia on this issue, but has the potential to harm the relationship between the two Governments across a range of issues. The Commissioner is satisfied that such a broad prejudicial outcome is firmly against the public interest and he has therefore concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
50. The Commissioner notes that DIT has relied on this exemption in respect of all the withheld information. He does not consider it necessary to consider the other exemptions that DIT has sought to rely on.
51. That said, the Commissioner would observe that disclosure of the information would also give rise to the prejudicial outcome described in section 24(1). This states that "(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security."
52. FOIA does not define the term 'national security'. However in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the then Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a

foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:

- 'national security' means the security of the United Kingdom (UK) and its people;
 - the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
 - the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence:
 - action against a foreign state may be capable indirectly of affecting the security of the UK; and,
 - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
53. The Commissioner's interpretation of 'required' within section 24(1) FOIA followed the approach in the European Court of Human Rights which decided that interference to human rights can be justified where it is necessary in a democratic society for safeguarding national security. 'Necessary' in this context is taken to mean something less than absolutely essential but more than simply being useful or desirable. 'Required' in this context is therefore 'reasonably necessary'. It is not sufficient for the information sought simply to relate to national security; there must be a clear basis for believing that disclosure would have an adverse effect on national security before the exemption is engaged.

54. In its letter of internal review to the complainant, DIT said:

"Where there is reliance on s.24 of FOIA the threat of undermining National Security from disclosure of the information requested has to be real but does not have to be immediate threat to the UK or its citizens. DIT considers the disclosure of the requested information into the public domain in respect of the IHL Analysis, could enable individuals to have insight into the sovereign assets and military capabilities and thus impact on the information and intelligence which supports the IHL Analysis and therefore could allow individuals to threaten those assets and capabilities and national security.

It is also considered that some individuals will have a greater level of motivation to seek out minimal data in order to combine with other available data and build an overall picture of the intricacies of the analysis and available information and intelligence considered in the IHL Analysis which could impact on sovereign assets and military capabilities and the availability of information and intelligence in the future. As a

disclosure under FOIA is a disclosure to the world at large consideration of the motivation of individuals who may seek to use the information to undermine National Security is relevant. For these reasons, I believe reliance on s.24 was correctly engaged.”

55. Further details of DIT’s view on the prejudicial outcome were explained to the Commissioner’s representative in person. Having considered these with respect to the withheld information, the Commissioner is satisfied that section 24(1) is also engaged with respect to all the withheld information.
56. He also agrees that in the circumstances of this case the Commissioner is also satisfied that the public interest is best served by withholding the requested information in order to protect national security. In reaching this view, he has carefully considered the public interests in disclosure as set out above.
57. The Commissioner has not gone on to consider the application of section 26 given he has concluded that all the withheld information is exempt under section 27 and under section 24.

Right of appeal

58. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.

60. 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

**Gerrard Tracey
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